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How fair is the American system of justice? How can the system be improved to meet our needs today and tomorrow? In the last of three issues on justice in America, seven articles explore and evaluate suggestions for reform. Nonetheless, as our introductory article points out, "The fact that reform is needed does not necessarily indicate that the American system of justice has been inefficient or discriminatory as measured by past standards. It does indicate that the American environment is changing . . . and that middle class Americans are becoming more sensitive to discriminatory injustices. . . ."

The Need for Judicial Reform

By Stuart S. Nagel
Professor of Political Science, University of Illinois

There are seven judicial reform problems which tend to be felt in criminal and civil cases: (1) bail reform, (2) egal counsel for the poor in criminal and ivil cases, (3) delay in civil and criminal ases, (4) mass media reporting on pending ases, (5) judicial selection, (6) the jury sysem, and (7) judicial nullification of legislaive and administrative acts.

'RETRIAL RELEASE

One of the first stages in criminal proceedngs which seems to call for judicial reform is he stage at which a decision is made about n arrested suspect prior to his trial. The asic alternatives involve releasing or not reeasing him prior to trial depending on (1) whether he can offer a sufficient money deosit to serve as a guarantee or incentive that e will return for trial, or (2) whether his haracteristics are such that he is likely to return for his trial rather than risk being prosecuted as a trial jumper. The first alternative is referred to as the traditional bail bond system, and the second alternative as release on one's own recognizance or the ROR system.

In past years, the bail system was by far the dominant method. This was so partly because of the belief that individuals were economically motivated and partly because the system favored middle class people whose interests tended to dominate legal rule-making. The reform trend is increasingly toward a more objective and scientific ROR system for a number of reasons.

Studies by the Vera Institute in New York City have shown that by carefully screening arrested suspects into good risks and bad risks (largely on the basis of their roots in the community and the seriousness of their crimes), one can obtain at least as low a per-

centage of trial jumpers as one does with the traditional money-deposit system.[1] Trial-day mail or phone reminders also help reduce trial jumping. These studies have further shown that, with the screening and notification system, a far higher percentage of arrested suspects can be released from jail pending their trial than under the money-deposit system. Such release means these good risks can (1) continue their jobs, (2) better prepare their cases to establish their innocence, (3) save the taxpayer money by not occupying jail space, and (4) be less bitter than if they spent time in jail and were then acquitted. The money-deposit system so inherently discriminates against the poor that the United States Supreme Court may someday declare it to be in violation of the equal protection clause of the Constitution.[2]

One objection to the ROR system is that it might result in releasing a number of arrested suspects who will commit crimes while awaiting trial. One response to this objection is that truly dangerous persons should be kept in jail pending a speedy trial regardless of how able they are to offer a large money deposit. Another response is to point out that pretrial crimes are more often due to long delays prior to trial than to poor screening or the lack of a bail bond requirement. The delay problem, however, is a separate area of judicial reform.[3]

LEGAL COUNSEL FOR THE POOR

In the 1962 case of *Gideon v. Wainwright,* the Supreme Court declared that criminal defendants who could not afford to hire an attorney to represent them should be provided with a free attorney by the prosecuting government at least for crimes involving more than a possible six-month jail sentence.[4] Prio to 1962, some states already provided counse to indigent defendants before the Suprem Court required it, although many states fel that free counsel to the poor was too expen sive, or socialistic, or unnecessary.

The big problem now is how, not whether to provide counsel. The basic alternative are either (1) relying on unpaid or paid vol unteer attorneys, (2) having the courts assig attorneys to represent indigent defendant or (3) using full-time public defenders wh receive a salary from the government to whic they are attached.

The unpaid volunteer system has the dis advantage that it too often attracts youn attorneys who are seeking experience at th possible expense of a client whose libert might be jeopardized. The paid voluntee system, however, works well at the federa level, where only well qualified attorneys ar allowed to volunteer, and where they are full compensated for their services. In smalle communities, where assigned counsel is ofte used, clients are frequently represented by re luctant attorneys or by attorneys who hav had little or no criminal case experience.

The full-time public defender system being increasingly used, although many publ defender offices are under-financed and un der-staffed and thus cannot investigate an defend their cases as vigorously as they othe wise should. To make the public defend applicable to smaller communities, states lik Minnesota are beginning to experiment wit regional public defenders who cover a nun ber of rural counties.

Although the Supreme Court has not y required free counsel for the poor in housin eviction, auto repossession, or other civil case the federal Office of Economic Opportuni and most local communities have sought provide some form of civil legal aid. The efforts are justified on the grounds that leg aid can promote respect for the law, prote the innocent, encourage orderly law refor and educate the poor to their legal rights an obligations.

The basic alternatives for civil legal a are similar to those for criminal legal ai

[1] C. Ares, A. Rankin, and H. Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole," 38 *N.Y.U. Law Review* 67–95 (1963).

[2] *Bandy v. United States,* 364 U.S. 477 (1960).

[3] For further detail on bail reform, see Daniel Freed and Patricia Wald, *Bail in the United States* (Washington, D.C.: Govt. Printing Office, 1964) and Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: Harper & Row, 1965). See also the article by Richard Pious in the July, 1971, *Current History.*

[4] *Gideon v. Wainwright,* 372 U.S. 335 (1963).

The traditional system has involved volunteer attorneys whose availability is generally limited and little known. In recent years, the O.E.O. has provided many cities with full-time civil legal services programs similar to public defender offices. Some attorneys have proposed the judicare system for civil legal aid whereby poor clients go to the attorney of their choice, and the government pays the attorney's fee as in medicare. The judicare system has been criticized as lacking visibility, specialists in poverty law, preventative education, and law reform; it is also criticized for an excess of bookkeeping, potential federal regulation and expensiveness.

To provide legal service to middle class people, proposals have been made for various kinds of legal insurance and various plans whereby attorneys for unions or other organizations can represent individual members. Such plans have, however, been opposed by bar associations who fear that organization attorneys will lack a close attorney-client relationship and who also fear the economic competition which such a system would represent to traditional law practice. Certain organizational schemes, however, have been declared by the Supreme Court to be protected by the freedom of assembly clause of the Constitution, and will probably increasingly be established.[5]

DELAY IN THE COURT

Increased industrialization and urbanization have indirectly produced undesirable delays in both civil and criminal cases. Automobile accidents mainly explain the long delays in civil cases, often extending to five years in the larger cities. Urbanization and the accompanying increased crime rates have significantly added to criminal court congestion.

In a delayed personal injury case, the injured party may be unable to collect what he is entitled to because of the forgetfulness and loss of witnesses and the pressure to settle for quicker, although reduced, damage payments. Although the delays are shorter in criminal cases, they can be especially harmful if the arrested suspect must wait in jail pending his trial and then receives an acquittal or a sentence shorter than the time he has already waited in jail. Criminal case delays are also harmful if the arrested suspect is released pending trial and commits further crimes during the long waiting period.

To reduce delay in civil cases, various reforms have been attempted or proposed. Some reforms are designed to encourage out-of-court settlements by providing for impartial medical experts, pretrial settlement conferences, interest charges beginning with the day of the accident, and pretrial proceedings to enable the parties to know where they stand with regard to each other's evidence. Other reforms are designed to remove personal injury cases from the courts by shifting them to administrative agencies, or by providing that injured parties automatically collect from their own insurance company regardless of their negligence as with fire insurance.

The time consumed by the jury trial stage can be reduced by having high jury fees, providing earlier trial for non-jury cases, randomly picking 12 jurors without lengthy selection, and by separating the liability and damage issues (so there is no need to discuss damages if the defendant is found non-liable, and so settlement can be facilitated if liability is established). Reformers have also recommended that delay be reduced by having more judges, making them work more days per year and more hours per day, shifting judges from low to high congestion courts, and decreasing wasted judge-time due to poor scheduling of the same attorney in two different courts.

Reforms designed to reduce delay in criminal cases are similar to those in civil cases. There can be better screening of complaints, more encouragement of guilty pleas where merited, more criminal court personnel, less use of grand jury indictment, more pretrial proceedings to narrow the issues, random jury selection, and release of the defendant within a specified period of time if he is not tried. The Supreme Court has recently made speedy

[5] For further detail on legal aid programs, see Patricia Wald, *Law & Poverty* (Washington, D. C.: Govt. Printing Office, 1965) and Lee Silverstein, *Defense of the Poor* (Boston: Little Brown, 1966).

trial in criminal cases a constitutional right at both the state and federal levels.[6]

REPORTING ON PENDING CASES

How to handle the problem of mass media reporting on criminal cases involves an interesting conflict between two civil liberties. On the one side is freedom of speech and freedom of the press which includes the right to report on pending cases. On the other side is the constitutional right to a fair trial which should not be prejudiced by distorted reporting or by reporting evidence that is not admissible in court.

The United States Supreme Court has been more sensitive to the fair trial interest than to the free press interest in cases where the two have conflicted. This was especially so in the 1966 Sam Sheppard case where the Cleveland newspapers published front page editorials demanding Sheppard's conviction, created near chaos outside the courtroom with their numerous photographers, and published unsubstantiated damaging statements by Walter Winchell and the Cleveland police chief that were never testified to at the trial.[7] The Supreme Court declared that in future sensational cases the trial should be held away from the community where the crime was committed; attorneys should be reprimanded for gossiping to reporters; jurors and sometimes witnesses should be kept from seeing newspapers; reporters should be held in contempt for printing gossip while a trial is still in process; and the number of reporters in the courtroom should be severely limited. After many years in prison, Sam Sheppard was eventually retried without prejudicial press publicity, and in that trial he was acquitted.

Since the Sam Sheppard case, many newspapers and newspaper associations have established various rules providing for voluntary press restraints. The American Bar Association has likewise established a set of rules restraining attorneys in criminal cases from communicating prejudicial information to the press. Because these restraints have not been sufficiently effective, some reformers have proposed more use of the British system whereby newspapers are readily held in contempt of court for publishing almost anything other than the barest facts about criminal trials until the trial is completed.[8]

JUDICIAL SELECTION

How should judges be chosen? Basically they are either (1) appointed by the President, governor, or mayor with or without the approval of a bipartisan nominating commission or legislature, or (2) elected by the general public with partisan or non-partisan election procedures. Originally nearly all United States judges were appointed, but during the period of Jacksonian democracy a shift toward electing state and local judges began. Federal judges have always been appointed as specified in the Constitution. In the last few decades, there has been a shift back to gubernatorial appointment of state and local judges.

Those who argue in favor of elected judges point out that judicial decision-making frequently involves subjective value judgments. In a democracy, these values should probably reflect general public opinion. The elector advocates also point out that elected judges will come closer in their backgrounds to the general public than appointed judges, especially if the nominating commission tends to be dominated by the state bar association. These and other differences in the attitudes and backgrounds of elected and appointed judges can be tested[9] by comparing elected judges with judges who have been appointed on appointed courts or on elected courts

[6] *Klopfer v. North Carolina,* 386 U.S. 213 (1967). For further detail on court delay, see Hans Zeisel, Harry Kalven, and Bernard Buchholz, *Delay in the Court* (Boston: Little Brown, 1959); Harry Jones, *The Courts, the Public, and the Law Explosion* (Englewood Cliffs, N.J.: Prentice Hall, 1965); and other articles in this symposium.

[7] *Sheppard v. Maxwell,* 384 U.S. 333 (1966). For the text see pages 106ff of this issue.

[8] For further detail on pretrial publicity, see Alfred Friendly and Ronald Goldfarb, *Crime and Publicity* (New York: Twentieth Century Fund, 1967); Donald M. Gillmor, *Free Press and Fair Trial* (Washington, D.C.: Public Affairs Press, 1966); and other articles in this symposium.

[9] Herbert Jacob, "The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges," 13 *Journal of Public Law* 104–119 (1964) and Stuart Nagel, *The Legal Process from a Behavioral Perspective* (Homewood, Ill.: Dorsey Press, 1969), pp. 173–197.

nterim judges to complete the unexpired erms of dead, retired or resigned judges.

Those who argue in favor of appointed udges seek to establish that appointed judges re less partisan in their judicial voting be- avior. This may, however, be due more to he bipartisan approval that is needed for ppointment, to appointment across party ines by some governors, and to the differences n how appointed judges view their roles, ather than directly to the selection process. The advocates of appointment also argue hat appointed judges are technically more ompetent because they tend to come from he better law schools and colleges than lected judges, but the empirical evidence loes not support this point.

Closely related to the method of judicial election is the length of judicial tenure, since udicial reform movements usually advocate oth appointive selection and longer judicial erms. Longer terms give a judge more in- lependence from political party pressures. uch terms, however, are likely to make udges less responsive to public opinion al- ough possibly more sensitive to minority ights.

Because of the somewhat evenly divided ontroversy over elected versus appointed udges, various compromises have developed. llinois, for instance, has provided for regular lections for vacant judgeships (with pro- ision for opposition candidates) to be fol- owed periodically by retention elections whereby each sitting judge runs against his ecord with the voters being able to vote only es or no on his retention). Such compro- ises will probably become increasingly prev- lent.[10]

HE JURY SYSTEM

Jurors in medieval England were originally ersons from the community who were wit- esses to the facts in dispute. Evenutally the ury evolved into a group of community rep- resentatives who resolved factual disputes in cases, while the judge determined the appli- cable law. Traditionally the jury has consisted of 12 people chosen by both sides from a list of voters, and they have determined guilt in criminal cases and liability civil cases by unanimous decision. In recent years, the idea of having juries to supplement the work of judges has come under attack.

It is argued that jury trials consume too much time or that juries lack competence. It is also charged that juries sometimes ig- nore the legal instructions given them, such as when they are told that plaintiffs in auto accident cases should not collect anything if the plaintiff has been partially negligent re- gardless of how negligent the defendant may have been. One can counter this criticism by saying that if an old law is unjust, as this rule of contributory negligence may be, the jury system often softens its harsh effects by applying a more contemporary community sense of justice.

The defenders of the jury system point out that a jury trial is more likely to free the innocent than a bench trial because all ap- proximately 12 jury members must agree to convict and because jurors tend to be more like defendants than judges are. Judges and juries agree approximately 83 per cent of the time in criminal cases, but when they disagree the jury is nearly always pro-defendant and the judge pro-prosecutor. This and other findings about jury behavior have been de- veloped as part of the research of the Uni- versity of Chicago Jury Project.

Defenders also argue that the jury system by providing public participation encourages respect for the law. It has, for instance, been found in before-and-after tests that being a juror does improve one's attitude toward the legal system. This public participation also enables ambiguities in the facts or law to be resolved in the direction of general public opinion.

As a compromise between the attackers and the defenders of the jury system, the trend seems to be in the direction of juries smaller than twelve men deciding by less than unanimous vote. This trend has been

[10] For further detail on judicial election, see ichard Watson and Rondal Downing, *The Poli- :s of the Bench and the Bar: Judicial Selection ıder the Missouri Nonpartisan Court Plan* (New ork: John Wiley, 1969) and Evans Haynes, *The lection and Tenure of Judges* (New York: Na- onal Conference of Judicial Councils, 1944).

especially present in civil cases, and the Supreme Court has recently held it to be constitutional for criminal cases.[11]

JUDICIAL REVIEW

After pretrial release, appointment of counsel, possible delay, newspaper reporting, picking of a judge and the jury's decision, there comes the stage of a possible appeal to a higher court. The most controversial aspect of appellate-court decision-making, although it can also occur at the trial court level, is the potential nullification by the court of a state or federal statute or administrative regulation. This process of judicial review is peculiar to countries whose constitutions are embodied in a single written document (unlike Great Britain) and is partly attributable to the personality of John Marshall as manifested in his *Marbury v. Madison* decision.[12]

Many arguments favor giving the courts the power of judicial review rather than leaving it to Congress and the people to determine the constitutionality of legislative acts. It is argued that Congress cannot be trusted to police itself since it has a vested interest in its own legislation. Another strong point is that unpopular minority viewpoints need the courts to protect them. It is also said that constitutional interpretation requires technical legal training which the courts have, and that the courts have less political bias than legislatures do.

Arguments against judicial review emphasize that Congress is more responsive to public opinion, although in the long run the courts are also somewhat responsive, at least via personnel changes. Attacks in the past on judicial review have also stressed the conservatism of the courts, particularly with regard to economic regulation. It is further noted that the lack of preciseness in the Constitution makes it more a political than a legal document, and that there have often been substantial differences between Democratic and Republican judges in constitutional interpretation.

Between the positions of complete judicial review over all types of statutes and no judicial review at all, there are many intermediate positions. It could be made more difficult for the courts to exercise judicial review by (1) requiring more than a simple majority of judicial votes or (2) allowing for congressional overruling, as with presidential vetoes. Other intermediate positions seek to make the Supreme Court more responsive by having it (1) composed of representatives from all three branches of government as in some West European systems, (2) an elected or shorter-term court, or (3) composed of representatives from all 50 states (a suggestion proposed in a constitutional amendment which many states have passed).

Further intermediate positions involve judicial review only over legislation relating to (1) the judiciary where the court has a special protective interest, (2) state legislation, in order to preserve American federalism, or (3) civil liberties matters where ideological, ethnic, or other minority interest need protection. The trend is decidedly toward the latter position of a civil liberties oriented judicial review. Big business, which received so many of the benefits of judicial review in the past, can more adequately protect itself in the legislative process today.[13]

There are other fields of reform in the American system of justice. For example

(Continued on page 113)

[11] *Williams v. Florida,* 399 U.S. 78 (1970). For further details on the jury system, see Harry Kalven and Hans Zeisel, *The American Jury* (Boston: Little Brown, 1966); Charles Joiner, *Civil Justice and the Jury* (Englewood Cliffs, N.J.: Prentice-Hall, 1962); and other articles in this symposium.

[12] *Marbury v. Madison,* 1 *Cranch* 137 (1803).

[13] For further detail on judicial review, see Howard Dean, *Judicial Review and Democracy* (New York: Random House, 1966) and Robert Carr, *The Supreme Court and Judicial Review* (New York: Rinehart, 1942).

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"Under the American system of checks and balances, the courts and the media both play roles which are given high priority in our constitutional system. . . . Neither of these vital institutions should hold pervasive sway over the other."

Pretrial Crime News: To Curb or Not to Curb?

By John Lofton
Staff member, *St. Louis Post-Dispatch*

Should mass media coverage of felony offenses subsequent to arrest be limited by law to the court record until a verdict is rendered? The answer is not easy because both the pro and con sides of this question are in part right. A resolution of the issue is made even more difficult because each side can cite United States constitutional provisions in support of its respective position.

On the one hand, the proponents of limiting media coverage of felony offenses can offer many examples in which the media prejudiced the outcome of criminal cases despite the fact that the United States Constitution in at least ten places[1] contains provisions designed to guarantee the rights of criminal offenders to fair treatment and impartial justice. On the other hand, the opponents of limiting media coverage can offer many examples in which the media helped to protect the rights of criminal offenders and aided the exoneration of the innocent, thus vindicating the media's right to the guarantee of freedom of the press under the First Amendment of the Constitution and under the constitutions of the states.

The case for curbing the media is usually stated most fervently by lawyers, who emphasize the constitutional rights of criminal defendants to be presumed innocent until proved guilty in a fair trial. They add that, without some curb on prejudicial publicity, the accused may be unfairly convicted on the basis of published allegations about him which are not substantiated or which have nothing to do with the crime and which would not be allowed as evidence at the trial.

The case against curbing the media is presented most passionately by newsmen, who emphasize the constitutional right of freedom of the press and claim that any limit on news about criminal cases may interfere with justice by shielding law enforcement officers and the courts from justifiable criticism based on press reports.

The advocates of restriction can show that judicial concern over the outside prejudicing of criminal trials extends back for more than 200 years and that, despite repeated remonstrances, the press in the United States has not mended its ways. In 1742, English Lord Chancellor Philip Hardwicke declared:

> Nothing is more incumbent upon the courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties, before the case is finally heard.

Lord Hardwicke's decision in this ancient case laid the legal foundation for the present English system under which judges summarily

[1] Article 1, Section 9; Article 3, Section 2 and Section 3; Article 4, Section 2; Article 6; and the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

punish for contempt of court newsmen responsible for publicizing evidence or comments which may be inadmissible at trial—that is, such material as confessions of suspects, information as to prior convictions of the accused, comments or accusations relating to past misbehavior or immoral conduct, reports ridiculing the character of the accused, press exposés of purported evidence, or any expression of opinion concerning a pending case.

The English system provides the best example of strict pretrial curbs on the media designed to prevent the prejudicing of criminal cases. Such strictures on the dissemination of extraneous information are intended to allow the law to take its prescribed course with criminal defendants. The law strives to reduce the chances for error by prescribing certain procedures for the handling of criminal cases. An arrested citizen may not be forced to answer questions in connection with a crime. Before making an arrest, the police must have probable cause to believe their suspect committed the offense and, under some conditions, they must have an arrest warrant and a search warrant, if they intend to make a search. The arrested person must be given an opportunity to gain the advice of an attorney.

After the arrest, the suspect must be taken without undue delay before a committing magistrate; he must be charged with a specific offense and given a preliminary hearing. The accused must then be indicted, but only if a grand jury—or in some states, the prosecuting attorney—has found probable cause to believe him guilty. After being charged, the accused must be brought to trial within a reasonable time. These various preliminary procedures are intended to insure that only those persons against whom there is convincing proof are brought into court.

To make the trial itself a reliable mechanism for arriving at the truth, complex rules have been been devised as to who may testify, what questions may be asked by attorneys and what evidence is admissible as relevant. The defendant may not be forced to testify against himself. To give effect to the law's presumption of innocence, the state must prove its case "beyond a reasonable doubt."

PRESS DISTORTION

When the media interject into such proceedings information that is designated by law as inadmissible, the processes of justice may be distorted in such a way as to produce an unfair result. Although the focus of concern is usually the impact of the media on jurors, the prejudicial impact of the press can affect policemen, witnesses, lawyers and judges, as well as jurors who, unlike the others, are at least screened for possible prejudice and who, if the sensational nature of the case seems to make them vulnerable, are sealed off from possible exposure to the media.

In the United States, the press usually does not limit itself to the charges and the other simple facts elicited by the preliminary hearing, but makes a special effort to get *ex parte* statements from the police and the district attorney and makes no effort to get corresponding statements from the defense. This tends to create a built-in bias against the defendant from the start. Such bias is illustrated by frequent news stories to the effect that the police have "solved" a crime with the arrest of a "thug," thus implying unqualified media acceptance of the prosecution side.

Of the various kinds of questionable evidence commonly aired in the pretrial stage by the police, prosecutors and the media, there are two categories which deserve special discussion: reported confessions and prior police records of suspects. In publishing or broadcasting reported confessions, the media seldom exhibit a cautionary attitude stemming from a recognition that the alleged admission of guilt may not have been voluntarily given. Although the United States Supreme Court has taken an increasingly strict view of the admission of confessions in court, there is reason to believe that physical and psychological force is still widely used in the back rooms of American police stations to extract admissions of criminal offenses over which investigators feel frustrated.

Perhaps the classic example of a well publicized false confession is that of George Whitmore, Jr., a 20-year-old, semiliterate, itinerant Negro laborer arrested by New York City police in 1964 and reported, after 24 hours of interrogation, to have confessed to several crimes, including the widely publicized stab slaying in 1963 of two Manhattan career girls, Janice Wylie and Emily Hoffert. Despite police assurances at the time that they had "the right guy," an assistant district attorney admitted later that the police, by "brain-washing, hypnosis, fright," made Whitmore give "an untrue confession." Still later a state Supreme Court fully cleared Whitmore of the Wylie-Hoffert murders and another suspect was convicted. Whitmore insisted that the original sensationally reported "confession," which could have sent him to the electric chair, had been beaten out of him. There is no way of knowing how many defendants have been convicted on the basis of broadly publicized forced confessions, the false character of which were never proved and brought to light. But there have been at least four book-length studies dealing with more than 100 actual convictions of innocent persons in American courts, some of them involving untrue confessions.

The second kind of questionable pretrial evidence which the media frequently disseminates is the prior police record of the suspect. The police record may even include arrests for which there was no follow-up or no conviction. In many, if not most, cases the past record of a suspect has nothing to do with whether he is guilty of the particular charge for which at the moment he is being held. Yet the existence of such "evidence" often induces the police to believe that suspects are guilty and leads them to try to pin crimes on them. Media broadcasting of prior records is likely to convey impressions of guilt to the public (including potential jurors) who assume that because the suspect was accused in the past, he is probably a chronic offender. Legal scholars who have delved into cases of wrongful convictions have pointed out that the airing of prior police records has often played a part in such miscarriages of justice.

THE COURT OF PUBLIC OPINION

Besides prejudicing cases by the pretrial dissemination of out-of-court opinions of the police and prosecutors and by the publicizing of confessions and prior records, the media sometimes interview witnesses and other trial participants in pending criminal proceedings, thus allowing an unfair "trial" of the case in the court of public opinion.

To avoid the possibility of media negation of the law's presumption of innocence and consequent unjust convictions, it can be argued with considerable cogency that legal prohibitions should be imposed against pretrial release by law enforcement officials or the media of the following kinds of information:

> Observations about a defendant's character;
> The defendant's arrest or criminal record;
> Statements, admissions or confessions attributable to the defendant;
> Statements concerning arguments or evidence expected to be used at trial.

Exceptions to these prohibitions would apply only when the release of certain information is necessary to the apprehension of a defendant who is a fugitive from justice.

Such strict curbs on the media can be justified on the grounds that, throughout American history, the press has in countless cases disregarded the principles of due process (fair play) in dealing with criminal cases and, despite exhortations from judges and others and the use of less stringent methods, has shown no overall inclination to reform its practices. As the Warren Commission said in rebuking newsmen for their handling of the assassination of President John F. Kennedy, the

> experience at Dallas . . . is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial.

Great Britain, which has imposed drastic restrictions on the media in criminal cases, still enjoys a justifiable reputation as a democracy with respect for freedom of the press.

But the opponents of legal controls on

media coverage of criminal cases prior to trial can also make a persuasive case for their position. The media have the function of providing for the public an independent scrutiny of the operation of all governmental institutions, including law enforcement agencies and the courts. If those who staff the agencies of criminal justice were in part shielded from the light of publicity, the society would be saying in effect that they are more entitled to trust than officials in other institutions.

Yet policemen and even judges have been bought by criminal elements in the United States and have allowed the law to go unenforced. In the 1950's, a Chicago *Sun-Times* editorial campaign helped to bring about the murder conviction of a man who had originally been freed by a grand jury through the improper influence of an assistant state's attorney. A miscarriage of justice might never have been corrected had the *Sun-Times* not been free to publish its conclusions.

On the other hand, unjust convictions may be brought about by policemen, prosecutors and judges who enforce the law carelessly or dishonestly and who are not easily subject to close scrutiny and exposure by the media. In a 1964 New York City case involving Gregory Cruz, an alleged murder suspect, newspaper reporters dug up evidence that helped free him before trial from false police charges. A restrictive policy on the release of pretrial news might have impeded their efforts.

Even the often-condemned pretrial publication of purported confessions can serve a useful purpose—by bringing forth accurate information from others who know that the confession is erroneous or by exposing police resort to duress. Factual accounts of alleged confessions may lead to inferences that coercion has been used and may prompt investigation from a quarter other than the police.

With respect to prior records, a plausible rationale for reviewing suspects' criminal histories in news accounts can be based on a showing that the record, by indicating a peculiar way of behaving or offenses of a similar nature, may suggest the suspect's connection with the new crime. Public knowledge of the record of some suspects, such as racket figures, may also help to deter behind-the-scenes deals with the police to avoid prosecution.

When they play their roles responsibly in the pretrial stage, the media can prevent the conviction of the innocent or unwarranted harsh treatment of the guilty. In a Phoenix, Arizona, case, the investigative work of reporter Gene McLain of the Arizona *Republic* helped substantiate the suspect's alibi claim that he was 500 miles away at the time of the crime and averted the prosecution of the wrong man for murder. In a 1964 case, a Miami *Herald* staff writer found and published the story of two witnesses, unknown to the police, to the effect that a murder defendant was being beaten by two law enforcement officers at the time he grabbed a gun and shot the officers. The disclosure resulted in a reduction of the charge. The American press can cite numerous cases in which unhampered reporting has kept justice on a straight course.

Even though curbs on the media seem on the whole to work well in safeguarding due process in Great Britain, satisfaction with the system is not universal among the British. Critics there have expressed the opinion that restrictions on the media have prevented the exposure of injustice. In any event, Britain is a jurisdiction with a long established and enforced tradition of fair treatment of suspects by the police and courts; in Britain, attorneys, who are not popularly elected to

(*Continued on page 112*)

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"How can our concepts of the individual's constitutional rights be reconciled with the realities of military effectiveness?"

Military Justice

By Edmund Joseph Gannon
Legislative Reference Service, Library of Congress

In recent years, the American public has become more and more aware of military justice. Dissent within the military and courts-martial for alleged offenses in Vietnam (to name just two areas) have generated substantial controversy over the fairness and efficacy of military justice. Underlying the opposing points of view are often widely differing premises concerning the objectives and functions of military justice.

The Constitution of the United States authorizes the Congress "to make rules for the government and regulation of the land and naval forces."[1] Former Judge Advocate General of the Army George Davis noted that:

> The system of Military Law which has received constitutional recognition in the United States is in great part derived from the rules of discipline which prevailed in the British Army at the outbreak of the American Revolution.[2]

These principles were, in turn, embodied in the Mutiny Act of 1689,[3] the Articles of War of James II, and the British Articles of War, 1765.[4]

The first American Articles of War were enacted June 30, 1775, by the Continental Congress. They were amended and enlarged upon by the American Articles of War of 1776, 1786, 1806, 1874[5] and 1916.[6] The last named articles were superseded by the Articles of War of 1920.[7] These articles (with certain amendments) remained in force until they were in turn superseded by the Uniform Code of Military Justice[8] (UCMJ) in 1951, the code of military law now in force.

Military law differs from its civil counterpart in a number of basic respects. With a few minor exceptions (e.g., foreign diplomats), all persons within the United States and its dependencies are subject to the laws of the United States. Military law, however, applies only to those persons in the military service.[9] Furthermore, whereas American civilian law has jurisdiction only within the confines of the United States (and aboard American flag vessels at sea), military law inheres in those subject to it wherever they may be.

BASIC DIFFERENCES

A number of basic precepts inherent in

[1] Article 1, Section 8, Paragraph 14.
[2] George B. Davis, *A Treatise on the Military Law of the United States* (New York: John Wiley and Sons, 1913), pp. 1–2.
[3] So called because it was passed by Parliament in response to the Ipswich Mutiny.
[4] The texts of these acts and articles are appended to William Winthrop's *Military Law,* II (Washington: W. H. Morrison, 1886), pp. 26–60. The Articles of 1765 included the American colonists statutorily. Section 19 of that act specified that American troops "acting in conjunction with our British forces, [shall] be governed by these rules or articles of war. . . ."
[5] For the texts of these acts, see Winthrop, *op. cit.*, pp. 68–125.
[6] 39 Stat. 650–670.
[7] 41 Stat. 787–811.
[8] 10 U.S.C. 801–940. This code is "uniform" because it embraces all of the military services. Prior to 1951, the Navy and Marine Corps were regulated by specific Naval Articles similar to the Articles of War.
[9] Again, there are a few exceptions. 10 U.S.C. 802 stipulates that prisoners of war in the custody of the armed forces and, in time of war, persons serving with or accompanying an armed force in the field are subject to the UCMJ.

American criminal law are absent from military law. Civilian law requires trial by peers; military tribunals are always composed of persons superior to the accused. In civilian trials, the "presiding" and prosecuting functions are separated (i.e., the judge belongs to the judiciary branch and the prosecutor belongs to the executive branch). In military proceedings, the convening authority appoints the members of the court and (in some cases) the defense and prosecuting attorneys. Civilian trials must be preceded by grand jury indictment. Courts-martial are not preceded by grand jury investigations although Article 32 (UCMJ) requires a thorough pretrial investigation prior to trial by general court-martial. This investigation, unlike the grand jury hearing, is advisory. The convening authority may proceed with a court-martial even if, in the opinion of the investigating officer, trial is not warranted by the evidence.

In its punitive articles,[10] the UCMJ defines many offenses which have civil counterparts. For example, Article 118 defines murder and authorizes trial by court-martial and, upon conviction, punishment for that offense. Certain other offenses are of a strictly military nature and have no counterpart in civilian law. For example, "misbehavior before the enemy" (e.g., cowardice), "subordinate compelling surrender," "aiding the enemy," "desertion," and "improper use of a countersign" (i.e., password) are all offenses of this class. In a third class may be considered those offenses which have civilian counterparts but which, in certain circumstances, are of a far graver nature when perpetrated by military personnel. For example, Article 128 defines assault—basically a civilian crime. However, a person who strikes his superior commissioned officer (Article 90) "shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct."

Finally, military law differs from civilian law in its objectives. While the latter has the function of preserving and fostering the tranquility of society, the former has the further objectives of preserving discipline and guaranteeing the security of the state.

MILITARY COURTS AND JUDGES

Under the UCMJ there are a number of trial and appellate courts. Under Article 15 of the code, military commanders may impose non-judicial punishment (NJP). Known to servicemen as captain's mast, company punishment, squadron punishment or office hours, NJP is the lowest form of formal military punishment. While the maximum punishment varies with the rank of the commanding officer involved, it usually takes the form of base restriction, correctional custody (a form of limited confinement), reduction in grade or performance of extra military instruction. A man may refuse NJP, in which event he may be tried by summary court-martial.

A summary court is the lowest formal military court. It consists of one commissioned officer who serves as judge, jury, defense, and prosecuting attorney. A summary court may impose short periods of confinement, restriction to quarters, hard labor and the forfeiture of pay (i.e., a fine). The Military Justice Act of 1968 allows an accused to refuse trial by summary court-martial and in lieu thereof to be tried by special court-martial.

Special courts-martial consist of at least three members. Unlike the summary court the special court often closely resembles a federal civil court. The accused must be afforded lawyer defense counsel within the continental United States. Outside of that area such counsel may be afforded if available. The convening authority may detail a military judge to a special court-martial in which event the judge presides over the proceeding and the members of the court act as a jury. In the event that a military judge is made available, the accused has the right, as in federal courts, to request trial before the judge rather than by the members of the court. The maximum punishments that a special court may impose are confinement, forfeiture of pay, reduction in grade and, if certain cor

[10] 10 U.S.C. 877–934. The punitive articles (Articles 77–134) define offenses under the UCMJ. The other articles of the code provide for such items as convening of courts-martial, pretrial investigation, continuances and so on.

ditions have been met, a bad-conduct discharge.

The highest criminal court in the armed forces is the general court-martial. It is reserved for the trial of persons accused of the gravest military offenses. The general court must consist of at least five members and a military judge. As in the case of the special court, the accused may request trial by military judge alone except in capital cases. Upon conviction, a general court-martial may sentence a person to confinement, dishonorable discharge, reduction in grade and, if the severity of the offense warrants, death.[11]

There are two appellate military courts. The lower of these are the courts of military review. They are established by the judge advocates general of each service. These courts must review any proceeding which adjudges death, a punitive discharge or confinement for a year or more. Members of the courts of military review are usually military judges although civilians may also be appointed. The upper appellate court is the court of military appeals. This court is composed of three civilians appointed by the President for 15-year terms. The court must review all death sentences, any convictions of general or flag officers (i.e., generals and admirals), and any court-martial certified by a judge advocate general.

Outside of the military court system there are other means of redress. For example, military commanders having court-martial jurisdiction have the right to review cases, overturn convictions and to reduce or vacate (but not to increase) sentences. Furthermore, outside of the military itself, a person convicted by a military court may seek relief from the federal courts. Indeed, the Supreme Court is the ultimate appellate court for military cases.[12]

[11] No capital punishment has been imposed by the army since 1961. There have been no navy executions in over a century.

[12] In a certain sense, the President may be considered the ultimate appellate authority since he has the power to pardon persons convicted of military crimes.

[13] Robert O. Rollman, "Of Crimes, Courts-Martial, and Punishment," *Judge Advocate General Law Review,* Spring, 1969, p. 218.

SOME BASIC PROBLEMS

The major problems inherent in the implementation of military justice today revolve around this question: How can our concepts of the individual's constitutional rights be reconciled with the realities of military effectiveness? In other words, can discipline be maintained without eliminating or at least limiting the safeguards civilian constitutional practice has developed over the years? Within the contexts of these questions may be considered such problems as dissent within the military, command influence over the conduct of military trials and their effect upon discipline within the military framework.

There are a number of examples from the past where changing social attitudes fostered changes in the military. For example, such practices as flogging, branding, disfiguring and publicly humiliating were discontinued because of public opposition to such cruelty. Furthermore, they made little contribution to military discipline that could not be achieved through less severe punishment.

Likewise, procedural changes in the administration of military justice have occurred when current practices have led to evident abuse. One judge advocate has described such a situation:

> After World War I Congress conducted a searching inquiry into the administration of military justice as a result of criticisms leveled at practices during the war. One incident that occasioned such action was a riot and mutiny which occurred near Houston with the subsequent trial of several soldiers and their sentence to death. The trial ran for several days and was properly conducted. Each night, the transcription of the day's proceedings was brought to the department judge advocate who wrote his review of the record to that point. The review was completed the night of the day the trial concluded. The sentences were approved and confirmed by the department commander, and the soldiers were executed the next morning. This justice was too summary for a citizen army of the twentieth century.[13]

Public reaction was so critical that the War Department instituted certain automatic reviewing procedures which covered all death sentences and punitive discharges.

Since World War II, there have been a number of cases which have severely limited the jurisdiction of military courts.[14] These, however, like the foregoing examples, have not had serious impact upon military discipline as such; i.e., they have not questioned fundamental military prerogatives on the battlefield or in any other military environment.[15]

Some proposed solutions to the above-mentioned problems, however, may bring into question, and indeed strike at, those basic prerogatives. Each of them deserves some consideration.

DISSENT WITHIN THE MILITARY

In a Department of Defense Directive, Secretary of Defense Melvin Laird has described the basic policy of the Defense Department in the area of dissent:

> It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander.[16]

Expression of dissent has taken a number of forms. Participation in demonstrations, publication of "underground" newspapers and membership in servicemen's "unions" are prime examples. When these activities are unlawful (e.g., participation in a demonstration in violation of public law), the serviceman involved may be punished—usually by court-martial.

It should be noted, however, that dissent, in itself, is not unlawful. The Adjutant General of the Army has stated that "dissent, in the literal sense of disagreement with policies of the Government, is the right of every citizen."[17] Nonetheless, when dissent is translated into action proscribed by military law the forces of the military courts may be brought to bear.

Active dissent by military personnel, however, may be considered unlawful, although identical action by a civilian may be perfectly legal. Dissent is very much a part of the American tradition, and the average citizen-soldier is to at least some degree aware of that heritage. In the military, however, dissent at certain times could be disastrous. Frederick Wiener, a lawyer and retired Army officer, contends that "an Army is not a deliberative body; if it were, had every GI in Normandy been free to argue Gen. Dwight D. Eisenhower's orders, the 1944 invasion would necessarily have failed."[18]

Wiener, however, chose a purely "military" example. Most examples of active dissent today have not revolved around the refusal to obey direct orders on the battlefield (as would be the case in the Wiener example). Rather, they have been expressions of disagreement with general military or political policy—somewhat different problem. Some of the movements are perfectly legal. For example, the Concerned Officers Movement (a group of military officers opposed to American participation in the war) has been described as "little more than a weekly political discussion group which meets in one of the officers' apartments."[19] Members of this group have been transferred from sensitive positions when their membership has become known to their superiors. Some servicemen have been trie

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[14] The most famous of these are *Toth v. Quarles* (350 U.S. 11) and *O'Callahan v. Parker* (395 U.S. 258). The former enjoined the Air Force from trying a former sergeant after discharge for the crime of murder. The latter disallowed military trials for crimes that are not "service connected."

[15] They have, however, raised certain serious questions about the administration of justice. For an example, an outgrowth of *Toth* is the apparent immunity of former servicemen involved in the My Lai massacre in Vietnam. There is no civilian court with jurisdiction (the crimes were committed outside the United States) and the military is forbidden to try them. It has been suggested that tribunals authorized to try persons for war crimes after their release from military service be created.

[16] "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," Department of Defense Directive 1325.6, September 12, 1969.

[17] Office of the Adjutant General, Department of the Army, "Guidance on Dissent," May 28, 1969, p. 1.

[18] Frederick B. Wiener. "The Perils of Tinkering with Military Justice," *Army*, November, 1970, p. 25.

[19] *New Republic*, September 19, 1970, p. 10.

by court-martial. For example, Navy Seaman Roger L. Priest was convicted of promoting disloyalty by a military court for printing an antiwar newspaper. Second Lieutenant Harold Howe was convicted of violation of Article 88 (Contempt Toward Officials) after he carried a sign which denounced "Johnson's Facist [*sic*] aggression in Vietnam."

Each of these cases involved violations of military but not civilian law. These cases and others like them must each be determined on an individual basis. This puts a tremendous responsibility on individual commanders (a factor implicit in Secretary Laird's directive cited above).

A significant portion of the "dissent" problem may stem from the fact that the American military represents a cross-section of American society. Thus, if dissent is fashionable in society at large, it is reasonable to assume that military personnel will reflect this attitude. For the military commander, however, the problem remains: how to square the needs of military security and discipline (and obedience to public law) with traditional rights guaranteed the citizen by the First Amendment and current social mores.

COMMAND INFLUENCE OVER COURTS-MARTIAL

Basically, the assumption of command influence is predicated on the fact that the convening authority of a court-martial exercises military authority over the members of the court. Thus it is presumed that in the event that the members of a court-martial were to return a verdict or pronounce a sentence displeasing to the convening authority the latter might vent his anger on the members of the court. Article 37 of the UCMJ forbids coercion of a military court and Article 98 provides for punishment in the event that coercion of a military court is attempted. To date, no one has been tried for that offense although allegations of command influence have been considered sufficiently grave to warrant the reversal of convictions by appellate courts in some cases. For example, in the case of *United States v. DuBay* (17 U.S. C.M.A. 147):

> [t]he appellants contended that the commanding general of Fort Leonard Wood, Missouri had prejudiced their trials. Before trial, each accused agreed to plead guilty in return for the promise of a specified sentence, rather than take the chance of receiving a stiff sentence from the court-martial. In the agreement between the accused and the commander (or a member of his staff), it was understood that if the court-martial rendered a milder sentence the accused could accept it; if the court-martial rendered a harsher sentence, then the commander, exercising his discretion to do so as convening authority, would reduce it to that agreed upon.
>
> The commanding general, however, took steps to guarantee that the punishment meted out by the court-martial would be much harsher than that agreed upon. . . .[20]

To avoid command influence and the semblance of such influence, the Military Justice Act of 1968 established the requirement that military judges be directly responsible to the judge advocates general of the various services for fitness reports or efficiency ratings. Furthermore:

> Another provision—one that critics say is not yet strong enough—is the prohibition against unlawful command influence by convening authorities and commanders. This has been done by new language in the law which forbids a commander from downgrading a subordinate on a fitness, effectiveness or efficiency report because of any judgment he rendered in a court-martial or because of his zeal in defending an accused in a court-martial.[21]

Opponents of the court-martial system contend that command influence is so pervasive within the military framework (i.e., the influence of a commander on his subordinates is so great) that legislative prescription cannot be effective in preventing the commander from influencing a court. If this is the case, the only effective solution would be removal of court-martial authority from military commanders completely. In line with this thinking is the allegation that "military justice is not justice at all because it is administered by

[20] "The Military Justice Act of 1968: Congress Takes Half-Steps Against Unlawful Command Influence," *Catholic University Law Review*, Spring, 1969, pp. 433–434. A court of military review eventually overturned the sentences on grounds of undue command influence.

[21] C. V. Glines, "Military Justice on Trial," *Armed Forces Management*, February, 1970, p. 36.

officers dedicated to military goals rather than to the rights of individuals."[22]

> The solution to the problem of command influence is uncertain. One solution may be to set up a civilian court system for trials of servicemen. But this system would completely ignore any military exigencies, thereby hindering the efficiency of the military and forcing the military to resort more frequently to administrative discharges.[23]

Supporters of the current system do not believe that command influence is so serious a drawback. A report submitted to the Secretary of the Army over a decade ago stated:

> Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of justice and in fulfilling this function it will promote discipline.[24]

This view is strongly contested by some military observers. For example, Colonel Samuel H. Hays contends that 'the primary objective of the system of military justice must always be to maintain discipline within the unit and to ensure prompt compliance with its dictates."[25] While it is the case that Colonel Hays opposes command intervention into the proceedings of a court-martial, he does contend that military courts are a significant influence on discipline and good order. In this he follows in a long line of military theorists.

In general terms, command influence can be classified as direct (e.g., the commander informs the members of the court of the verdict and sentences that he expects to be delivered) or indirect (e.g., members of previous courts who perform in a manner pleasing to their commander receive favorable fitness or efficiency reports, choice assignments and promotion, thereby providing an example to guide the judicial acts of their successors). Beyond these two general cases may be considered the commander whose manner, bearing, competence and other excellent qualities so impress his subordinates that they consider themselves duty bound to find guilty and severely punish any serviceman that commander might order to trial. If this proves to be the case, it is doubtful that any legislative alteration short of radical revision of the current system could effect a cure. As noted above, one commentator has suggested shifting the court-martial system to essentially civilian courts. "Another solution may be to mete out 'nonjudicial' punishment for lesser offenses, while reserving the major offenses for this civilian court system. The Department of Defense would probably vigorously oppose enactment of either of these solutions."[26]

MILITARY DISCIPLINE

The problems of dissent within the military and command influence over military courts are both intimately related to the basic problem of military discipline, albeit in different ways. The former, according to one theory, challenges traditional discipline because it weakens the group identification upon which discipline is based. Samuel Hays has argued that:

> Group solidarity, sometimes identified as discipline, provides the organization with the predictable response and teamwork which is essential to battlefield survival and success as well as to normal subordination to properly constituted authority. This solidarity is not, however, easily or readily developed, particularly in a highly individualistic society.[27]

Hays is not alone in this view. Secretary Laird's statement (cited above) was to the effect that the right of free expression was limited by the demands of "good order and discipline and the national security." Further, the Secretary stipulated that "no commander should be indifferent to conduct which . . . would destroy the effectiveness of his unit." Thus it appears that where the requirements of discipline come face to face with the desires of the individual serviceman to express him-

[22] *Ibid.*, p. 36.
[23] "The Military Justice Act of 1968 . . . ," *op. cit.*, pp. 439–440.
[24] Quoted in Austin J. Gerber, "Command Influence," *Army*, February, 1966, p. 64.
[25] Samuel H. Hays, "The Soldier's Rights in a Free Society," *Army*, May, 1970, p. 30.
[26] "The Military Justice Act of 1968 . . . ," *op. cit.*, p. 440.
[27] Hays, *op. cit.*, p. 29.

self with the same freedom as his civilian counterpart, the former will still take precedence.

The problems associated with command influence are somewhat more complex than those related to dissent. The latter is construed either to be legal or to have developed into a violation of military law. If the former is the case there is no problem. If the latter prevails, a judicial action will probably follow. Command influence, however, is not so easily discerned.

Command influence of some kind will probably exist as long as commanders are also convening authorities. Some degree of command influence is presently considered acceptable. For example, commanders are obliged to instruct their subordinates in their responsibilities as members or potential members of military courts. This is both a military and a professional responsibility of a commanding officer. The point at which responsible instruction gives way to undue influence over a military court and, consequently, violation of Article 37, is not strictly defined. Perhaps for this reason there have been no convictions for unduly influencing a court-martial. Furthermore, it is possible that punishment of a commander for such a violation would in fact be punishment for an excess of zeal. Such an event could only have the most deleterious effects on military discipline and morale.

SOME THOUGHTS ON REFORM

Generally speaking, the reform of military justice insofar as the problems discussed above are concerned usually refers to a relaxation of the rules as they now stand. Supporters of such reform contend that freedom of speech and expression—as such freedoms are construed to inhere in civilians—should apply to members of the armed forces. Likewise, critics of military justice who object to any command interference in the proceedings of a military court envision a system of military courts similar if not identical to the federal civilian court system. In effect, proponents of reform contend that by entrance into military service a man does not forswear his basic rights.

This concept finds strong opposition among theorists of military justice. O'Brien contends that a citizen, upon becoming a soldier, assumes an additional social character which binds him to the state in a manner more thorough than his previous condition.

> The citizen on becoming a soldier does not merge his former character in the latter. He releases himself from none of his former duties or obligations. Instead of this he engages to perform other duties *in addition* to those with which he was formerly charged . . . The general law claims supreme and undisputed jurisdiction over all. The military law puts forth no such pretensions. It aims solely to enforce, on the soldier, the *additional* duties he has assumed. It constitutes tribunals for the trial of breaches of *military* duty only . . . [It does not] affect to redress civil injuries or private wrongs, unless they be in some degree connected with the safety and good order of the military state. . . .[28]

A theorist of more recent vintage has noted that:

> [w]e must avoid the common error of attempting to project civilian values, methods and objectives into an institution in which many are dysfunctional and even dangerous. That we can afford much time and effort in civilian courts in protecting the rights of an accused does not in itself mean that we must apply the same methods and pay the same price in a military environment where the risks are many times higher and the objectives of the group decidedly different. In the serviceman's world, where the lives of comrades, the security of his unit or even his nation can stand in the balance of some person's actions, one can not long tolerate personal eccentricities, desires, or even needs.[29]

Thus the problem stands: How can the military be invested with civilian norms of free speech and court proceedings comparable to civilian practice without vitiating military discipline? It is possible that it cannot be completely accomplished through legislation.

(Continued on page 112)

[28] John P. O'Brien, *A Treatise on Military Law* (Philadelphia: Lea and Blanchard, 1846), pp. 26–27.

[29] Hays, *op. cit.*, p. 33.

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"We cannot leave the trial courts to self-destruction. . . . Reform must begin now and go beyond mere tinkering. . . . We must turn from arguing over irrelevant appellate court decisions and legal theories to doing something about the way the law actually works, or fails to work, in reality every day for millions of Americans."

Criminal Court Logjam*

By Leonard Downie, Jr.
City Editor, *The Washington Post*

Plea bargaining is what the lawyers call it. No trial. No jury of peers. No exhaustive search for truth.

No exacting legal rules. Only empty, sometimes dishonest words substituted for the reality of due process guaranteed by the Constitution.

A lawyer who knows next to nothing about his client or the facts of the crime with which he is charged barters away a man's right to a trial, and, along with it, the presumption that a defendant is innocent until proved guilty—the presumption on which the American system of criminal justice rests. A prosecutor who knows little more about the case than what a policeman tells him hurriedly trades off one of American society's most important responsibilities—the responsibility for providing a full hearing for those charged with criminal acts and the levying of appropriate sanctions upon those convicted of crimes against that society. The judge, who has abdicated his authority to bartering lawyers, acquiesces to all this and sanctifies it for "the record."

Everyone pays lip service to justice. But everyone's true faith is in expediency.

And why not? An indifferent public has allowed the system to become overwhelmed with work: too many cases for too few judges, too few lawyers, too few clerks. An uncaring legal community has failed to modernize the system to cope with the inundation. How else can the system survive, except by trying to dispose of cases as fast as it can?

Plea bargaining instead of trials is the answer in crowded criminal courts across the nation. In New York, prosecutor and defense attorney haggle over guilty pleas in front of the judge's bench in frenetic whispers between cases. In Chicago and San Francisco, the bargaining is often carried out in polite confidential conferences, sometimes in the judge's chambers, with his participation. In Washington, D.C., brisk and business-like plea bargaining is conducted in small glass-enclosed cubicles in the prosecutor's office before the case goes to a judge. In Dallas, prosecutors bargain directly with incarcerated defendants through jailhouse bars. According to the best estimates, at least 90 per cent of the persons "convicted" in American courts are never proved guilty at all. Instead, they plead guilty without trials.

Everyone in the system, including the judge and the defendant's own lawyer, offers inducement or exerts pressure for a guilty plea, to save the time and trouble of a trial. If the prosecutor is not empowered to reduce

* This article is made up of excerpts from Chapter II, "Criminal Court or Sausage Factory?" and Chapter VIII, "To Re-establish Justice: Making the Law Work," of the book *Justice Denied: the Case for Reform of the Courts,* by Leonard Downie, Jr.

the charge, the judge makes it clear that his sentence will be lighter for a guilty plea. Those who insist on a trial, the most basic of constitutional rights, are openly punished by prosecutors and judges with maximum charges and harsh sentences.

In places where the prosecutor habitually levies only one charge for a crime, usually the strongest suitable for the circumstances, prosecutors and defense attorneys—especially public defenders who are also paid by the government and work alongside the prosecutor in court every day—operate on informal understandings that certain charges will always be reduced to certain lesser offenses. In California, for instance, according to a recent study by the University of California Center for Legal Studies, "burglary" is usually reduced to "petty theft," "assault with a deadly weapon" to "assault without a weapon," and "molesting children" to "loitering at a school playground." (In cities like Detroit and Chicago, where a charge of armed robbery frequently becomes one of unarmed robbery if the defendant pleads guilty, the decision to plead is called "swallowing the gun.") In Washington, D.C., the distinction between a plea for felonious assault and one for simple assault, which is a misdemeanor, often is based on the number of stitches required to close the victim's wounds. In New York City, four of every five defendants originally charged with a felony wind up pleading guilty to a misdemeanor.

"We are running a machine," a Los Angeles prosecutor has told one researcher. "We know we have to grind them out fast." A Chicago prosecutor uses the same words, vowing, "I'll do anything I can to grind them out fast." So, frequently, will the defendant's own lawyer, whether he is a public defender or is privately retained, with the result that, on almost any day in a big city's criminal court, a defendant can be seen disavowing before a judge a guilty plea arranged by his lawyer.

ANOTHER SHORTCUT

But plea bargaining is not the only shortcut to justice practiced regularly in criminal courts today. Many thousands of cases—in many places, half the court's serious criminal cases—never even get as far as the plea bargaining stage. The defendants charged in them—innocent and guilty alike—are arbitrarily set free before a trial, in effect acquitted by default, because the overburdened system cannot accommodate them.

Under pressure to keep the judge's case calendar as light as possible, the prosecutor drops charges against defendants wholesale before the cases can reach the judge. These decisions, made by a young assistant prosecutor, usually overworked and inexperienced, are most often based on a quick glance at police reports of arrests. Summarily, he tosses out cases that seem too "weak"; cases involving charges, such as a husband's beating his wife, that seem too tawdry for the court to consider; those involving, as defendants, neat-looking, middle-class people who seem "respectable" and not likely to get into trouble again. Frequently, perhaps, the prosecutor is dispensing admirable justice and saving the system from needless further congestion. But nobody ever knows for sure. The prosecutor makes no investigation of his own before acting. Most often, no judge reviews his decision. Some judges, in their turn, throw out still more cases in large lots. The judges, too, base their decisions on no more than a look at a court paper or a remark from a prosecutor or defense lawyer.

Certain defendants, usually the often convicted and knowledgeable, win freedom simply by outwaiting the courts. Patiently, they endure delay after delay arising as a natural product of the overloaded system, and then they have their lawyers stall still longer with procedural tricks and requests for postponements that nobody has time to challenge. In the end, witnesses who have come back to court again and again stop showing up, or, as the months pass, even the most conscientious among them find their memories fading. Judges and prosecutors become impatient with musty cases that further bog down their operation, and a carefully timed request by the defense lawyer, often on a

day when witnesses are not present, is enough to persuade a judge to throw the case out.

There still are trials. But, when a rare criminal trial does take place before a judge or a judge and jury, it is often a shadow drama of the real thing, played out by poorly prepared lawyers before obviously uninspired judges, who sometimes conduct their more productive guilty-plea business off to the side of the bench while the trial is in progress. Seldom, except for the most complicated, serious, or glamorous cases, has the prosecutor or even the defense lawyer—both of whom have crowded schedules of their own—planned what he was going to do in advance. Sometimes, the judge has to coach the prosecutor and defense lawyer to ask questions of witnesses or to make motions they would not otherwise have thought to make themselves. Or, conversely, the harried judge must work to speed up the case, reminding the lawyers not to "stall" with questions or arguments that seem to him unrewarding and prodding a jury that spends more than an hour or two deliberating its verdict. (Lawyers for both sides in the chaotic Manhattan branch of New York City's Criminal Court say that a long trial there is any that lasts more than ten minutes.)

Indeed, momentous Supreme Court decisions and currently fashionable public and legal debates over criminal law and the rights of the accused are simply irrevelant to what actually happens each day inside the courtroom. In many cities, judges and lawyers never bother to explain to defendants (as appellate courts have instructed them to do) those various constitutional rights they can invoke to protect them in court. Despite high court rulings on the right to a lawyer, many defendants still do not have one, or else they wind up with courthouse hangers-on of dubious ability who can get no other clients. The admissibility at a trial of a confession obtained by police is perhaps the most debated public issue concerning criminal courts, but it is essentially a moot question in a system where 90 per cent of those convicted admit guilt, anyway, in the courtroom. Appellate court decisions and legal controversies over what evidence can be used against defendants when they are tried are virtually meaningless when few defendants are ever actually brought to trial. Accusations that judges are too lenient or too harsh on criminals, or too pro- or anti-police, assume powers that judges often no longer exercise in deciding guilt or innocence, or even fixing sentences, in many criminal cases.

Mass-production criminal justice in the United States dates back at least to before the first national surveys of American courts in the 1920's and 1930's began to document and decry the gradual disappearance of adversary justice in criminal courtrooms. (No systematic study has ever been made of the workings and consequences of the mass-production processes that have evolved, such as plea bargaining.) But expediency has not necessarily meant efficiency. In many cities, for example, the court system's traditional disorganization and the avalanche of work now crashing down onto it seem to be leading inevitably to the day when the criminal-court machinery may grind to a standstill.

OVERCROWDED COURTS

The criminal courts are the neglected stepchildren of already overcrowded, undermanned, niggardly financed, and hopelessly antiquated state and local systems of trial courts. In New York City, some criminal-court judges must conduct court in converted clerks' offices and judges' robing rooms. In Baltimore, Cleveland, and Chicago, among other places, most misdemeanor cases are tried in makeshift courtrooms located on the upper floors of old police station houses, while the police continue doing business downstairs. These rooms are like those in old tenements, with exposed pipes, peeling paint, falling plaster, and splintered wood. Only secondhand accessories and an old desk for the judge make them officially courtrooms. There is seldom room for half the participants to sit.

Criminal court is where the chief judge sends rookie, hack, or senile judges who cannot be trusted with complicated civil cases. The majority of the private-practice lawyers

appearing before them are counterparts of Detroit's Clinton Street bar (called "Fifth Streeters" in Washington, D.C., and the "Baxter Street bar" in New York City). They wait for judges to appoint them to cases, or they prowl the halls soliciting work from defendants and relatives of defendants who pass by. If they are not paid by the local or state government, management of their client's cases is built around efforts to extract money from defendants or relatives. The client is told bluntly that the quality of service depends on the fee. If time is needed for the money to be raised, the lawyer has the case postponed in court. Judges knowingly cooperate in this fee-collection effort by postponing the case without reason when a lawyer gives the signal. In New York, the attorney usually tells the judge he needs time to locate a witness, a "Mr. Green."

The absence of much concern, scrutiny, or help from the outside reinforces in criminal-court bureaucrats a profound cynicism and resistance to criticism and change. Eventually, the malaise overtakes even many of the young and idealistic newcomers joining the staffs of the prosecutor, public defender, or probation-office chief.

Avoiding "unnecessary" trials, processing the sausages with the bridgeman's unremitting haste, ignoring the fates of defendants and crime victims alike, blotting them out as human beings—this, in sum, is the business of criminal courts across the country. The necessity to move cases quickly is the central need. Determining guilt or innocence, deciding on the treatment of offenders, and dealing with those in the public who are dragged into the process are all secondary matters. Means are shaped not in accordance with the constitutional ideal of justice but, rather, to satisfy the ends of the bureaucracy in its daily battle with case loads.

"Impressed with a conviction that the true administration of justice is the firmest pillar of good government," George Washington said, "I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system."

Overburdened, undermanned, and backward in operation, the nation's trial courts some two hundred years later barely survive as bureaucratic institutions. They are failing to cope with widespread disregard for the law or with the inequities in American society that flout the meaning of justice as the increasing frustration experienced every day by the hundreds of thousands who come into contact with them undermines general respect for and trust in the law.

The most numerous users of the trial courts today are ordinary citizens: crime victims, witnesses, and accused criminals; traffic offenders, automobile accident victims and accident witnesses; landlords and tenants; merchants and creditors trying to collect unpaid debts; wronged consumers; divorcing couples; heirs to estates; citizens involved in common disputes with other citizens. These people "seek simplicity and economy of procedure, expertise in the consideration and expedition in the disposition of cases."

But what they are faced with instead are interminable delays, the necessity for countless return trips, expensive legal fees, and poorly trained and frequently uncaring judges, lawyers, and clerks, who do little to make the courts responsive to the needs of the public. Justice is callously denied them daily—causing inconvenience, hardship, and worse for most who come into contact with the courts.

NEED FOR REFORM

We cannot leave the trial courts to self-destruction. Potentially a source of strength in an increasingly difficult world, they are now in such sad shape that they discourage a society that has no other established institution to turn to in its quest for justice and stability. Reform must begin now and go beyond mere tinkering. A new court building here, a few more judges there, some minor changes in rules, a landmark appellate court decision on some legal technicality—this is all that has happened since Roscoe Pound first began sounding warnings to the bar and the public nearly seventy years ago.

We must turn from arguing over irrelevant

appellate court decisions and legal theories to doing something about the way the law actually works, or fails to work, in reality every day for millions of Americans. We must stop pinching pennies on court finances while allowing the far greater expense of crime, disorder, and citizen dissatisfaction to mount. We must stop treading lightly on lawyers' toes. We must begin instead to entertain and act on suggestions for radical reform.

Just such suggestions are now beginning to appear with unprecedented abundance from a new breed of legal researchers who do not fear questioning entrenched tradition or bringing scientific methods of inquiry and sociological viewpoints to bear on studies of court problems. Thus far, however, their findings have been presented to the legal community in piecemeal form—in the reports of Presidential commissions on the causes and remedies of crime and violence and such studies of law professors, largely financed by philanthropic foundations, as those by Jerome Carlin on lawyers' ethics and the legal problems of the poor, Harry Kalven and Hans Zeisel on the causes of court delays and the workings of the American jury process, Robert Keeton and Jeffrey O'Connell on automobile accident litigation and insurance, and Herbert Packer on the treatment of many kinds of social problems as crimes. Many lawyers still are not familiar with the majority of these new court reform studies, and the general public has been acquainted with almost none of them. Only sporadic press discussion of the Presidential commission studies of crime and violence and the speeches on court reform by Chief Justice Burger and a few other lawyers and judges have reached many citizens.

Suggested reforms for specific problems include: (1) reorganization of local trial courts to end jurisdictional confusion and unequal resources; (2) the abandonment by judges and lawyers of archaic delay-producing procedures; (3) the modernization of the machinery of the courts with professional management and such technology of today as computers; and (4) the restructuring of the legal profession and the law schools to channel more and better trained lawyers, judges, and supporting personnel into the trial courts. All these reforms have gained increasing support over the past year even from within the legal profession, thanks in great part to the leadership of Chief Justice Burger.

Still more needs to be done, however. The courts should be more accessible and more responsive to more citizens. Ways must be found to provide inexpensive legal counsel for working-class and middle-class citizens, as well as for the very poor. Changes must be made in laws and court procedures that give the rich, landlords, merchants, creditors, and government interests unequal advantage over working men, renters, debtors, consumers, welfare recipients, and the poor in general.

Despite strong opposition from lawyers who do not want to lose any business, there is growing interest in removing automobile accident litigation from the courts through reform of liability insurance practices. Even wider support is gathering behind efforts to transfer prosecution of minor traffic violations from the courts to local government motor vehicle agencies, to remove the criminal sanction from narcotics use, gambling, drunkenness, and certain sex acts between consenting adults, and to enable citizens to probate uncontested wills, obtain uncontested divorces, and buy and sell real estate without required legal representation. These changes would eliminate much congestion in the courts, but, more importantly, they

(Continued on page 116)

Leonard Downie, Jr., won the American Bar Association Gavel Award and the Library Bell Award of the Federal Bar Association for a 1966 series of articles on the Court of General Sessions in Washington, D.C. In addition to his book, *Justice Denied* (New York, Praeger, 1971), from which this article is taken, he was one of three principal contributors to the book *Ten Blocks from the White House: Anatomy of the Washington Riots of 1968* (New York: Praeger, 1968).

"There can be no perfect correctional system. Prisons, parole agencies and allied services are concerned with seriously flawed men whose attitudes and behavior have been conditioned by the worst features of an imperfect society. . . . Nonetheless, the modern correctional planner . . . must recognize a responsibility to continue the three revolutions which are the essence of modern criminal law."

The Need for Prison Reform

By John P. Conrad
United States Department of Justice

Of all those institutions which are maintained as necessary evils, the most unappreciated is the prison.* Hardly a day goes by without a new denunciation of the brutalities at worst or the dehumanization at best which occur within the inhospitable walls of incarceration. Reporters horrify us with reports of what they see and hear during brief spells of voluntary confinement. Social scientists point convincingly to the futility of penal methods. There is a growing literature of fury composed by inmates and former inmates. Necessary evils, the correctional administrator repetitively insists, but critics with an eye for results demand a proof of the necessity.

It was not always so. Once the American penitentiary was the great reform in criminal justice, copied the world over. No longer were the gallows and torture required. American philanthropists had found an alternative. Work and penitence would be the lot of the criminal, to be meted out in facilities especially designed for the requirements of expiation.

Statesmen and scholars from Europe came to the United States on study missions to observe our new methods. Certainly American prisons were not our proudest boast, but the replicas still to be found all over Europe remind us how profoundly our visitors were impressed.

STUDIES OF PRISONS

Perhaps the two most famous and indefatigable European investigators were Gustave de Beaumont and Alexis de Tocqueville, two young Frenchmen who arrived on our shores in 1831 to see our prisons for themselves. They went on to study our democracy, too, and de Tocqueville's *Democracy in America* is still valued for its shrewd but profoundly sympathetic insights into our institutions and our culture, Less well known is their report of their observations of our penal systems. The title is cumbersome: *On the Penitentiary System in the United States and Its Application to France.*[1] As a reflective but diplomatically courteous account of the seamy side of American life, it is a worthy companion to de Tocqueville's much more famous study of our society.

The authors seem to have identified the essential difference between our system and the old world way of disposing of criminals without difficulty:

* The views expressed herein do not necessarily represent the official policies of the Law Enforcement Assistance Administration or the Department of Justice.

[1] Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application to France* (Carbondale, Illinois: Southern Illinois University Press, 1964).

> It is very true that the punishment of death, applied to the greater part of crimes, is irreconcilable with a system of imprisonment; but this punishment abolished, the penitentiary system does not yet necessarily exist; it is further necessary, that the criminal whose life has been spared, be placed in a prison whose discipline renders him better. Because, if the system, instead of reforming, should only tend to corrupt him still more, this would not any longer be a penitentiary system, but only a bad system of imprisonment.[2]

PENAL THEORY

To achieve the prison whose discipline improves the prisoner, our pioneer penologists worked from a theory. They reasoned that if prisoners are to corrupt each other, they must communicate. If they are kept separate, they can concentrate on self-improvement without the distractions of discourse about crimes and the means of committing them. On this principle, the Commonwealth of Pennsylvania built prisons in which prisoners could neither speak to each other nor even see each other. In Philadelphia, the Eastern State Penitentiary became famous as the instrument of this principle of reform. It is still occupied, but the convicts who inhabit its ancient cells are no longer shielded from each other.

To construct such a prison was a costly enterprise in altruism, too costly for Pennsylvania's sister states. But it was sedulously copied in England, in Scandinavia, and elsewhere in Europe. It expressed the still prevailing notions of crime and the reasons for committing it. The criminal was thought to have proceeded from his own free will and to have perversely chosen to do wrong when he could just as easily have chosen to do right. Our historic religious traditions taught our forefathers that the expiation of sin required prayer and suffering. It must be said that the Pennsylvania Prison was a fit place for penitence if the criminal were ever to choose that course.

The State of New York, also faced with urban crime in great volume, accepted the principle of preventing corruption, but chose different means of achieving this end. Its prototype, also still standing and still occupied, was the famous Auburn Prison. There the convicts lived separately at night, but by day they worked in company, in total silence. Observing that this method was much less expensive than the Pennsylvania system, most other states decided to follow the New York example. It was soon discovered that by sound management the labor of the prisoners could be made to pay for the maintenance of the prison.

PENITENTIARY IDEA FAILS

Idealism dies easily in prisons. Wardens and guards soon found that work and the opportunity to repent in silent solitude were not enough to achieve reform. One penologist summed up his view of the failure of the penitentiary idea as follows:

> Having been in habits of association with the most infamous and degraded of their species, they can *feel* nothing but that which comes home to their bodily suffering. . . . The hope once entertained of producing a general and radical reformation of offenders through a penitentiary system is abandoned by the most intelligent philanthropists, who now think its chief benefit is in the prevention of crime.[3]

Bodily suffering the convicts knew. Horrifying accounts survive of the treatment administered to those who transgressed prison rules by breaking tools, refusing to work, or by behaving insolently to their officers. We are told that

> One convict who had menaced a prison official with a stone ax and refused to work was flogged on as many as six different occasions, with each lashing consisting of from fifty to four hundred blows. A keeper who saw the victim's back recalled that "nearly all the skin appeared to be taken off from his neck to his heels, excepting a small space across the loins!" Nearly every officer in the prison, it seemed, had taken a hand in administering the stripes. . . . So pronounced was the mania for flagellation that on one or two occasions keepers were permitted to strip and flog inmates who were just entering prison, "for insults offered to such keepers, or

[2] *Ibid.*, p. 38.
[3] W. David Lewis, *From Newgate to Dannemora; The Rise of the Penitentiary in New York, 1796–1848* (Ithaca: Cornell University Press, 1965) p. 101.

alleged offences committed previous to conviction."[4]

Conditions like these do not fester undetected for long. They become scandals which require correction. Nineteenth century America did not lack outspoken reformers with a specially low tolerance for wrongdoing by the state. The great American innovation in criminal justice had gone very wrong. There had to be a better way than work and repentance under the terror of the lash.

EXPERIMENTS IN REFORM

The better way evolved from new ideas brought from abroad. In Australia, and a little later in Ireland, experiments were devised whereby reform was motivated by incentives rather than coercion. Good behavior was rewarded by "good time," or the remission of a part of a sentence. It was also during this period that the American enthusiasm for universal education swept the country. It took hold in prisons, too. A new breed of reformers proposed that learning, not repentance, was the route to reform. It followed that convicts, formerly thought to be evil men who chose evil of their own free will, might now be viewed as inadequately prepared to cope with society and its requirements. Education as well as repentance was required if the criminal were to be sufficiently improved to choose good rather than evil.

The change was revolutionary. Its implications were perhaps not seen by all, but it is now clear that our ancestors chose to consider the criminal as mostly inadequate or unfortunate rather than mostly bad. The change can, in a sense, be dated. In its first annual conference, the American Prison Association adopted in 1870 a surprisingly high-minded Declaration of Principles, in which society's responsibility for the criminal's behavior is clearly identified.[5]

Like many other declarations, beginning with the Ten Commandments, the Declaration of Principles survives in honor by lip-service. In actual day to day prison regimes it is distressingly easy to ignore. Nevertheless, for most states there has been for many years a discernible level of decency in prison management. This level of decency orginates with the Declaration of Principles of 1870, regularly revived by the American Correctional Association, as the original prison association was eventually redesignated. Terrible things still happen in prison, but they happen surreptitiously and less frequently than in the times of our nineteenth century forebears. They are almost never justified or approved, especially as a means of rehabilitating prisoners.

THE THIRD REVOLUTION

What has been recounted in the foregoing narrative is the origin and development of the two revolutions in our penal law and practice. We put an end to the gibbet on which malefactors of trivial degree were hung by our European ancestors. We offered the prisoner his salvation by hard labor. When we found that hard labor was not enough, we decided to change him into a better man by education, by trade-training, by pastoral ministrations of a more appealing nature than threats of damnation and, as fashions moved us, by various forms of psychotherapy. These efforts continue to this day, and will doubtless continue for many years to come, but a third revolution is taking place before our eyes.

If the first revolution produced, eventually and uncertainly, a minimum level of humanity, and the second revolution resulted in programs to change the wrong doer, the third revolution is directed at the achievement of efficiency. Good management does not come naturally to the penologist. Presiding over wasted lives as he does, the conservation of time and labor and resources does not assume the importance in his mind which it occupies in the minds of most administrators. Usually his task is to find hard labor for his charges, and often he must settle for putting two or three men to work which one

[4] *Ibid*, p. 151.

[5] Harry Elmer Barnes and Negley K. Teeters, *New Horizons in Criminology: The American Crime Problem* (New York: Prentice-Hall, 1945), pp. 552–553.

could handle with ease. The time which his prisoners serve is one of the costs of public safety. Until recently it seemed to be a cost borne principally by the prisoner.

Questions about the costs of prison management and its benefits have begun to arise with mounting insistence. Analyses of correctional budgets have shown that per capita costs of care have risen steadily so that figures in the $4,000 per year range are not at all unusual. Some specialized institutions have reported figures in excess of $10,000 a year per inmate. At these levels, it becomes an issue to determine whether the taxpayer receives benefits commensurate with the high costs he pays.

REHABILITATION COSTS

The answer might be found in the cost of rehabilitation. If it costs $10,000 a year to change a warped or incompetent personality into a responsible citizen, we might say that $10,000 was the charge for the imperfection of institutions which have resulted in so much damage to the individual. But there has been little or no evidence that the educational, vocational training or psychological counseling programs to which prisoners have been exposed with so much hope have produced these rehabilitative effects. It is therefore argued that if two years of incarceration does not rehabilitate a man it is pointless to keep him for three in the hope that another year will make a difference.

This argument takes on special force when the cost of keeping a man locked up amounts to ten times or more the cost of supervising his conduct on parole. Modern penologists now agree that one of the special disadvantages of confinement is the separation of the offender from the community, resulting in the dislocation of his ties to family, to the economic system, and to the ordinary course of life as a citizen at large. Parole programs which are administered with some sensitivity to the predicament of the offender can often facilitate the readjustment process.

Not all prisoners making the transition from confinement to freedom by this route achieve the success that nearly all hope for. For many, the grade is too steep and too much damage has been done by improvident habits, the loss of roots in the community or the loss of self-confidence. But there have been enough successes attained by men with exceedingly poor prospects to justify the belief that parole programs which stress the transition to the community represent an economic as well as a social saving.

Some states and cities have taken other steps to facilitate the offender's return. Much attention has been given to the development of work-release programs, in which offenders are employed in the community by day but return to the prison or jail by night. This plan is by no means new; it has been in use in Wisconsin jails since before World War I. Its attraction to the progressive penologist is considerable; the offender is working at a regular industrial pace; he pays for his keep in prison; and he puts aside a considerable sum of money against the time of his parole or discharge.

What is important about the new developments in parole services is not that they rehabilitate more offenders than the conventional prison attempts. It is doubtful that halfway houses or work-release programs really make much difference in the rehabilitation of more than a few at best. But there can be no question that these forms of partial control are much less expensive than continuous confinement. So far as can be determined from the studies which have been made, there has been no serious compromise of public safety and the long-range results have been certainly no worse than the recidivism rates of 45 to 50 per cent reported by most prison systems.

There can be no question that the relatively few exceptionally dangerous offenders must be kept in fully secure programs for long periods of time. Murderers, rapists and other cut-throats are not released to work-release plans or halfway houses without thorough consideration of all the circumstances and the consequences of relaxation of control. For most offenders the question is more heavily governed by economic factors. Is it indeed worth $4,000 or more to lock up

a specific burglar or thief for another year when he could be released to supervision costing a fraction of that amount at no appreciably greater risk?

THE FUTURE

There can be no perfect correctional system. Prisons, parole agencies and allied services are concerned with seriously flawed men whose attitudes and behavior have been conditioned by the worst features of an imperfect society. For all too many of them the hope of personal fulfillment in conventional society has never been realistically open to achievement. The conventional society to which we hope to return them under such adverse circumstances at best is largely intolerant of offenders. Finally, no society has ever been able to eliminate the conditions which create its criminals. These conditions lure the released offender to new failures, especially when success seems as unattainable as ever.

Nevertheless, the modern correctional planner and administrator must recognize a responsibility to continue the three revolutions which are the essence of modern criminal law. He must strive continuously and vigilantly to maintain a level of common decency in the system. Because of the monotony of the work of any guard whose task is limited to the prevention of disorder and also because of the provocation which many inmates give to staff and to other inmates, the danger of a lapse from decent means of control is always present and always difficult to remedy when it occurs. The humanitarian revolution is never really won; it has to be protected not only by the responsible leaders of corrections but by the support of an intelligent and understanding public, unwilling to tolerate brutal or unfair abuse.

The second revolution is compromised by disappointment. The proof of rehabilitation so far eludes its most steadfast proponents. Yet it is in the idea of rehabilitation that the offender can derive what little hope he can muster for his personal future. Opportunities for changing himself of his own volition provide what little hope he can realistically enjoy. Further, the effort by the state to provide him with that basis for hope is the token of the community's willingness to accept his return as a citizen rather than as a malefactor and outlaw. It is not a great price to pay, but the return cannot be expected to be economically positive.

The third revolution seems likely to limit further the actual prison population. Increasingly, the American society likes to see results as the outcome of investment. If the cost is high and going higher, the only way to reduce the bill is to limit admission to our prisons to those who can be safely managed in no other way, and to keep them confined for as brief a time as possible.

This is a revolution which will probably make hard labor the lot of the adult offender, hard labor in the same sense that most citizens must perform it. Admittedly, for most of us, this labor is not so hard as the labor of our forefathers, but a society in which even those behind bars must contribute their proper share is a society which may come to peaceful terms with itself.

We can manage our prisons and correctional systems more decently, constructively and efficiently. Some individual crime problems can be solved. But, in the end, the total crime problem, the menace which frightens the citizens of so many of our cities, will respond only to our determination as a nation to correct the conditions which cause the crimes. It is in such a mighty effort by the whole nation that the future success of corrections is to be expected—not in another revolution of the system.

John P. Conrad was formerly chief of the research division of the California Department of Corrections. On leave from official duties, he was a Senior Fulbright Fellow at the London School of Economics in 1958–1959, and was associate director of the International Survey of Corrections in 1960–1961. He is the author of *Crime and its Correction* (Berkeley, Calif.: University of California Press, 1960), and of numerous magazine articles.

"If history is any guide, the upshot of the controversy over the jury system will be some sort of compromise. The pressures for reform are very strong, and there are some signs of give in the present structure."

Jury System Reform

By Allan S. Nanes
Legislative Reference Service, Library of Congress

Generally speaking, the American people consider trial by jury to be one of the cherished rights to be enjoyed by a free society. After all, the idea that a man's guilt or innocence should not be determined solely by officials of the state, but by a group of his peers, can be traced back to antiquity,[1] and has characteristically been associated with the struggle for freedom from arbitrary power. It became embedded in the fabric of Anglo-Saxon institutions even before Magna Carta, so that the guarantee of a jury trial which that famous document contains was actually an enunciation of preexistent law.

The right to a jury trial in criminal cases is found in Article III, Section 2, of the Constitution, which states in part: "The Trial of all Crimes, except in cases of impeachment, shall be by jury." This provision is buttressed by the Sixth Amendment, which stipulates that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Seventh Amendment provides that in suits at common law, where the amount in controversy exceeds twenty dollars, the right of trial by jury is to be preserved, and no fact tried by a jury is to be reexamined in any court of the United States except under the rules of common law.

However, the Constitution only established the right of jury trial in criminal cases before the federal courts and in a broad, but not all-inclusive, category of civil cases. It did not provide for juries in that branch of civil law known as equity, but followed the English practice in which actions in equity were conducted without juries.[2] Nor did it actually apply to the states, although some persons might erroneously draw that conclusion from the language of the Sixth Amendment. Instead, the guarantees of jury trial in the states were to be found in the state constitutions. A further safeguard was added with the adoption of the Fourteenth Amendment, which provided in part that no state could deprive a person of life, liberty or property without due process of law. Since jury trials were an accepted feature of "due process," the amendment further diminished any likelihood that the states would interfere with them. However, it was not until 1968, in the case of *Duncan v. Louisiana,* that the Supreme Court actually applied the right to a jury trial to the states, by incorporating Sixth Amendment rights in the Fourteenth Amendment.[3]

Even today, however, all aspects of a federal trial are not necessarily applicable in the states. For example, the customary 12-mem-

[1] Frank M. Quinn, "Juries And Criminal Responsibility: Necessary Reforms," *Journal of Urban Law,* Vol. 47, No. 191, 1969–1970, p. 192.
[2] Morris J. Bloomstein, "The American Jury System," *Current History,* June, 1971, p. 361.
[3] Frank M. Quinn, "Juries And Criminal Responsibility: Necessary Reforms," *Journal of Urban Law, op. cit.,* p. 192.

ber jury and unanimous verdict need not, under present constitutional interpretations, be practiced in the states. Indeed, some states are now permitting jury trials with fewer than 12 jurors.

These changes, while they may be inconsequential on the surface, are symptomatic of a much deeper controversy involving the jury as an institution. For the question which has been posed so often in the past is being posed once again: namely, whether the ends of justice are served by the retention of the jury system.

CHARGES AGAINST THE JURY

When Judge Harold M. Mulvey of the Connecticut Superior Court dismissed murder and kidnap charges against Black Panthers Bobby Seale and Ericka Huggins, he did so in terms which dramatically highlighted one of the chief complaints against the jury system, namely, that it is almost impossible to get an impartial jury for a case which is given extended coverage in the media. His statement also underlined another major indictment against the jury system as presently constituted: it can result in unconscionable delay. As the old legal maxim has it, "justice delayed is justice denied."

The long trial against Seale and Huggins had ended with the jury unable to reach a verdict. The judge thereupon dismissed the charges against the pair with the following statement:

> With the massive publicity attendant upon the trial just completed, I find it impossible to believe that an unbiased jury could be selected without superhuman efforts which this court, the state, and these defendants should not be called upon either to make or to endure.[4]

In making this statement, the judge undoubtedly had in mind the 17 weeks it had taken to assemble the jury out of some 1,500 prospective jurors who had been examined.

Important though they are, criticisms of juries because they have been prejudiced by media accounts, and of jury selection because the process delays trials unnecessarily, are just two of many charges now levelled against the jury system. It has also been said that juries actually fail at the job of finding facts, which is their primary obligation. Juries are not accountable to the public, hence individual jurors lack that feeling of responsibility which, it is claimed, attaches to judicial office. Judges are in the public eye; they are identifiable; they have an obligation to those who appointed or elected them. Furthermore, the judges are specialists in weighing evidence and in assessing the credibility of witnesses while the jurors are not.

Those who question the juries' abilities as fact finders tend to take a dim view of the intellectual capacity of jurors generally. They contend that so-called substantial people are usually too busy for jury duty and do their best to be excused. Besides, it is argued, lawyers often do not want sharp, intelligent jurors. The result, according to this argument, is that jurors tend to come from unintellectual backgrounds, to work at routine jobs, and to lack both sophistication and discernment.

This is rather harsh criticism, and one may wonder whether it is completely justified. More to the point is the fact that the jurors have a terribly difficult job. They are not permitted to take notes as judges are, but must try to commit to memory skeins of information that may be hopelessly tangled; they are forced by the rules of evidence to exclude information that would influence their judgment in a more natural situation; they are given the responsibility of deciding issues that may be emotionally charged; opposing lawyers may play heavily on their prejudices.

The difficulties facing the juror, as outlined above, provide additional ammunition for those who would substantially reform the jury system. Yet there are those who contend (and quite forcefully) that rather than being difficult, the juror's job is actually easy. The basis of this contention is that the jury has become, in effect, the pliable tool of the judiciary.[5]

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[4] *The Washington Post,* May 26, 1971, p. A1.

[5] Jon M. Van Dyke, "The Jury As A Political Institution," *The Center Magazine,* March/April, 1970, p. 17.

These critics of the jury system maintain that the ordinary juror feels inadequate in the face of legal complexities and jargon. Thus he believes himself obliged to act according to the judge's charge. That charge is often narrow and restricted insofar as expounding the prerogatives of the jury is concerned. For the fact of the matter is—and this seems to be known to relatively few citizens—that the jury does *not* have to follow the judge's instructions, for no punishment ensues if it does not.[6]

Unaware of their powers, juries overwhelmingly follow the judges' instructions. In those instances where appeals are made on the grounds that particular instructions were excessively narrow, the appellate courts usually uphold such restrictive charges on the grounds that otherwise juries would be too apt to follow their prejudices, and that the rule of law would soon be replaced by a kind of rule of lawlessness.

Some modern critics, then, are not so much opposed to the jury system *per se,* but to the juries' diminished role as mere fact-finders, with no discretion to interpret the law.

Such critics suggest that the jury system is ineffective in carrying out the functions with which it is charged. For this reason some 90 per cent of those accused by formal judicial process in this country of committing a serious crime are not convicted by a jury of their peers.[7] Rather, this 90 per cent are convicted on the basis of their own guilty pleas. In effect, such individuals are convicted without a jury trial. The process by which this takes place is known as plea-bargaining or plea-negotiation. An accused person pleads guilty to a lesser offense than the one for which he was arrested. The prosecution promises to recommend a lighter sentence in return for the guilty plea. It cannot guarantee the defendant that the judge will go along with its recommendation, but it has good reason to believe that he will.

With court dockets jammed, and with our judiciary short of both facilities and personnel, the temptation for most judges to accept the guilty plea is overwhelming. The accused will invariably swear that no promises were made to him in order to induce a guilty plea. Judges will accept this at face value, often knowing full well that it is not so. They do so, some would say, in order to keep our system of criminal justice from being strangled by the sheer volume of cases.

Yet it would be difficult to deny that this whole process contravenes the very essence of the jury system. The facts as presented by the prosecution become the facts of record. There is no clash of interpretations, no presentation of alternative facts and theories. No jury sifts these facts and interpretations to arrive at the truth. The constitutional right to trial by jury is thus bypassed in all those instances where a defendant pleads guilty as a result of the plea-bargaining process. The fact that defendants are willing to waive that right, and that judges acquiesce in this procedure, is certainly indicative of a lack of confidence in the jury system. The defendant lacks the confidence to entrust his fate to the deliberations of the jury, while the judge lacks confidence in the ability of a jury trial, as presently conducted, to make any contribution to speedy justice and a consequent break in the clogged judicial pipeline.

A further aspect of jury trials that seems to have received little public attention is the cost of such trials to the jurors themselves. There is the financial cost for many whose employers will not make up the difference between a juror's pay and his or her regular salary. There is the psychic cost of having one's normal routine interrupted. Increasingly, jurors find themselves sequestered in hotels, guarded by deputy sheriffs, not only to prevent discussion of the case but also to prevent comment in the media from affecting their detachment. In important or dramatic criminal cases the jurors may be on the receiving end of crank calls or letters for months after they return a verdict.

The inconvenience and disruption to peoples' lives caused by jury services cause many eligibles to seek ways to avoid serving, even to the point of not registering to vote,

[6] *Ibid.,* p. 18.
[7] Gerald L. Hallworth, "The Myth of the Jury Trial," *Commonweal,* April 25, 1969, p. 161.

since jury lists often come from voting lists. Indeed, the zeal with which people seek to avoid jury duty does not speak well for the vitality of the system. If individuals seek to avoid jury duty, how conscientious can they be if they are chosen nonetheless? If too many people succeed in avoiding jury duty, how can juries "fairly express the values of an entire community"?

This bill of particulars against the jury system would seem to add up to a rather overpowering indictment. To a person surveying the sources for the first time, moreover, the amount of critical writing seems to outweigh that of approbation. Nevertheless, the jury system has its staunch defenders, with a surprising number of these coming from the ranks of the judiciary. Another surprising aspect of the debate is the fact that many of the arguments cut both ways. For example, opponents of the jury system might argue that jurors are easier to corrupt than judges, while defenders of the jury might put it the opposite way. In general—and this is subject to the usual *caveats* about generalizations—one might say that defenders of the jury system appear to believe that the worldly experience of the jurors is a valuable counterbalance to the specialized and possibly narrow competence of the judge insofar as affording a fair trial to those accused of a crime.

To revert for a moment to this question of corruption, defenders of the jury system would probably argue that there is always a better opportunity to tamper with a continuing body, such as the magistracy, than with an *ad hoc* body such as a jury convened to hear a particular case. Furthermore, jurors, in theory at any rate, are beholden to no constituency. They do not have to justify their views with respect to particular cases, while judges are often obliged to do favors for their constituencies and may be under a strong temptation to appease them. One way of so doing, of course, is to decide cases in accordance with the general feeling of the community. Juries mean freedom from outside influence, and they possess a potential for impartiality which many feel exceeds that of the judge.

Just as it is a weakness in judges to be swayed by popular feeling, so it is a strength of juries that they can keep the administration of the law in touch with the feelings and spirit of a community. Justice Holmes remarked in 1889 that he believed in leaving questions of negligence to the jury, for while this might be a defect from the standpoint of its theoretical function, it would introduce a large amount of popular prejudice, and thus keep the administration of the law in accord with the feelings and wishes of the community.[8] Another point made by proponents of the jury system is that by preserving it the formal stability of our law and judicial institutions can be maintained, while behind this protective screen reform can keep going forward.

A favorite target of the jury's defenders is the notion that judges are better both in finding facts and deciding policies than the proverbial "twelve good men and true." Usually this is denied outright on the ground that the jurors are drawn from all walks of life and have therefore a broader collective experience than any judge. Juries are presumed to be more flexible than judges, whose outlook is largely a product of their experience and training and who interpret new experiences to conform to that outlook. The very fact that they have observed so many witnesses does not mean that the judges will be any shrewder in appraising new ones than a jury of laymen. In fact, the tendency of judges to pigeonhole people may compare unfavorably with the more tolerant view taken by a jury.

This same argument can be carried over to substantive issues. Courts and judges, so the juries' champions maintain, tend to decide cases by formulae and ritualized concepts. The jury, on the other hand, tends to rely more heavily on its sense of justice and equity, based on a more unsophisticated view of what is right and fair. It is argued, in a

[8] In "Law in Science and Science in Law," 12 *Harvard Law Review*, 443, 459–460, 1889. Quoted in U. S. Senate, Committee on the Judiciary, Recording of Jury Deliberations, "Memorandum Regarding The Jury System, by Harry Kalven, Jr.," 84th Congress, 1st Session, 1955, p. 65.

somewhat similar vein, that the matters of fact that juries are called upon to decide in civil cases do not really require close rational analysis, and that therefore whatever superior ability a judge may possess to subject alleged facts to hard, analytical scrutiny is more or less irrelevant. The jury is actually supplying policy in civil cases, the argument runs, and there is every reason to believe that whatever policies it supplies will be as good as or better than those that might be furnished by a judge.[9]

One point related to the question of fact finding made by protagonists of the present system is that the jury is required by the rules that apply to different types of cases to reach its decision unanimously, or by a two-thirds or three-fourths majority. Thus it represents a consensus, whether unanimity obtains or not. A judge, on the other hand, cannot sit down and formally elicit others' opinions when the responsibility for decision is his. What this argument is saying, in effect, is that the considered judgment of a group of men is superior to the considered judgment of an individual.

It is also argued that the jurors are in a far better position to comprehend the mental and emotional situation of a witness than a great many lawyers and judges. The lawyer or judge may see a witness at his worst, under the strain of cross examination, badgered by rules that in the layman's eyes may prevent the full revelation of the truth. The juror may well be more understanding of the witness and have greater insight into his feelings than a judge, simply because he can imagine himself in that witness's shoes. In short, the juror is more nearly the peer of the witness or the defendant than is the judge, and recognition of this fact is one of the great achievements of Anglo-American jurisprudence that should not be lightly set aside. Under this system, the witness or the defendant is entitled to be evaluated by those likely to be the kind of people he would mingle with outside the courtroom, whose life experiences would be similar to his own, rather than by the judge, who is the servant and representative of the state. The validity of this psychological insight has stood up over the years, and helps maintain popular respect and support for our courts as an institution.

Such respect, supporters of the jury system plead, is needed today more than ever. At a time of social unrest, with many of our institutions (including the courts) subject to scathing and even nihilistic attack, anything that strengthens respect for those institutions is worth clinging to. If we are to assess the importance of the jury, all we need do is imagine the reaction if the government were somehow able to eliminate juries altogether. Those professing disenchantment with the establishment would be quick to seize on any action as further proof that the government was moving to suppress liberty. The outcry might well be intense. Thus it is possible to argue that the preservation of the jury system today is bound up with respect for the law and the courts.

Certainly it seems safe to say that in the popular view the guarantee of trial by jury is regarded as a safeguard of liberty. As Chief Justice Taft noted in *Balzac v. Porto Rico,* in speaking of the jury system, "One of its greatest benefits is in the security it gives people that they, as jurors actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse."[10]

In sum, the jury helps attach people to the law; it breeds a certain confidence in the law; and it can give the citizen a sense of participation in his own government which is otherwise so hard to come by. Besides, say the jury's advocates, juries cannot be as bad

(Continued on page 114)

[9] Curtis, "The Trial Judge and the Jury," 5 *Vanderbilt Law Review,* 150, 166 (1952). Cited in "Memorandum Regarding the Jury System," *ibid.,* p. 66.

[10] "Memorandum Regarding the Jury System," *op. cit.,* citation of the case is 258 U.S. 298, 311 (1910).

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"Judicial systems are not only the product of reasoned debate and legislation, they are also the result of irrational historical developments and current patterns of social and political thinking. . . . And in some situations, the grafting of a procedure or structure which works well in one country onto the judicial system of another may engender more problems than it solves."

British, French and American Systems of Justice Compared

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In Great Britain and the United States, jurisprudence is historically rooted in the *common* law. The common law was developed in England from the fifteenth through the nineteenth centuries and brought to this country by the colonists. It derives its name from the fact that it was common throughout England as opposed to local law in Kent, Sussex and so forth. One of the chief distinctions of the common law is that it is judge-made. Legislative bodies played a relatively small role in developing the rules, principles and doctrines of the common law. Normally, when settling a case, a judge looked to previous court decisions (precedent) or to general doctrines for guidance, not to legislative enactments.

In France (and much of the remainder of continental Europe), jurisprudence is based upon the *civil* law. This is a somewhat misleading term denoting a body of legal principles derived from Roman law, canon (church) law and medieval commercial law. For the most part, these principles are spelled out in the *Code Napoleon* drawn up between 1800 and 1810. The civil law was developed largely by legislative bodies; their codes spelled out legal principles in considerable detail. When settling cases, judges looked to the code for guidance. They were not expected to give heed to previous court decisions or uncodified doctrines.[1]

The philosophical and historical differences separating the common and civil law are probably less important in the last half of the twentieth century than they were in earlier times. As a result of our rapidly changing social and technical behavior, United States and British legislative bodies now pass far more laws which have greater detail than was the case 100 years ago; judge-made common law is consequently less important in the Anglo-American countries. For the same reason, French codes are less applicable to new situations, and French judges find themselves forced to make some law. In other words, there are many functional similarities between the judicial systems of Anglo-American countries and France. Nonetheless, many important common–civil law differences continue to affect the structure, procedure and philosophy of justice in the United States and Great Britain, on one hand, and France, on the other.

Space is too limited to permit a thorough

[1] For a brief description of the development and philosophy of the civil law, see John Henry Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969), chaps. 1–7.

comparison of the three systems. We will have to focus on some of the broader and more vital aspects of judicial systems for analsis. First, we will describe the structure of the court system in each country. Next we will look at the ways by which judges and prosecutors are selected. Finally we will compare criminal and civil justice across the three nations.

JUDICIAL STRUCTURE

As the structure of United States courts has been described in articles in a preceding issue (June, 1971), we will not focus on the details here. However, it should be emphasized that with some exceptions neither American trial nor appellate courts are specialized. They can and do hear cases in all areas of the law. This stands in some contrast to the English court system and is a major difference between the American and French systems.

Because the United States is a federal system, there are two sets of courts (as far as a resident of any given state is concerned): one at the national level and one at the state level. Each tries violations of its own laws. At the apex of the American judicial system stands the United States Supreme Court which can hear appeals from both lower federal courts and from state supreme courts. With rare exceptions, however, the Supreme Court hears only those appeals it considers important; a litigant seldom has any right to have the Supreme Court hear his case.

The Supreme Court has two main functions: interpreting federal statutes and interpreting the United States Constitution. Its interpretations are found in opinions which explain its judgments in cases coming before it. Those interpretations must be followed by all courts throughout the land—both state and federal. The binding force of the Supreme Court's decisions helps keep the federal system in balance and insures that the constitution will be applied similarly throughout the land in both state and federal courts. Moreover, because it is generally the final arbiter of the constitution's meaning, the United States Supreme Court has a power known as *judicial review*. This is the power to declare unconstitutional any law, state or federal, which the court decides is contrary to a specific constitutional provision. Laws found unconstitutional are null and void and are treated by the courts as if they had never been enacted. The power of judicial review is an American invention; it is not exercised by courts in Great Britain or France.[2]

In interpreting the laws and constitution, many of whose most important provisions are extremely vague (e.g., "no state shall deprive any person of life, liberty or property without due process of law"), the Supreme Court justices must necessarily exercise considerable discretion. Along with judicial review, it is this discretion which gives the Supreme Court its influential place in the American political system. The extent to which the Supreme Court helps to shape public policy can be seen by considering such recent rulings as those in the *Desegregation Case*,[3] the *School Prayer Case*[4] or the *Miranda* case.[5] As we shall see, the British and French high courts do not have anything approaching a similar influence on the political issues in their countries.

THE ENGLISH COURTS

In Great Britain, the court system is somewhat more confused than it is in the United States, partly because it is the product of somewhat haphazard growth over eight centuries, whereas the United States judicial structure is mostly the product of more recent and rational constitution-makers. Additionally, Scotland and Northern Ireland have distinct judicial systems stemming from their own historical development. For conveni-

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[2] Chief Justice John Marshall assumed this power for the Supreme Court in the famous decision of *Marbury* v. *Madison*, 1 Cr. 137 (1803). For an argument that judicial review is unimportant as far as federal legislation (but not state legislation) is concerned, see Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law*, VI, 279–95 (1958).

[3] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[4] *Abington School District* v. *Schempp*, 374 U.S. 203 (1963).

[5] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

ence, we shall focus on the court system in England.[6]

There are two judicial structures in England—one for civil cases and one for criminal cases. However, at appellate levels the same judges sometimes sit on both types of courts. The criminal court system has three levels of trial courts rather than the usual two prevailing in the United States. Justices of the peace in rural areas or magistrates in cities try misdemeanors and handle arraignments in more serious crimes. Next there are Quarter Sessions Courts, which try felonies for which a sentence of five years or less can be imposed. Appeals from the JP or magistrates courts are also heard here. Finally there are the Assize Courts which try murders and other serious felonies; Assize Courts do not hear any appeals. Defendants can appeal convictions from either the Quarter Sessions Court or the Assize Court to the Criminal Division of the Court of Appeal, the most important tribunal in English criminal jurisprudence.

At the base of the civil court structure is the County Court (still so-called although its jurisdictional boundaries seldom any longer coincide with English county lines) which hears mostly modest contract and damage suits. Cases of greater magnitude are heard by the High Court of Justice. This court has three divisions: the Queen's Bench (common law suits), Chancery (suits at equity), and a Probate, Divorce and Admiralty division. The Queen's Bench division contains 36 judges and is one of the most ancient, prestigious and busiest courts in the realm. It is presided over by the Lord Chief Justice, the second ranking personage in the English judiciary. Members of the Queen's Bench also serve as judges in the Criminal Division of the Court of Appeals.

Appeals from any division of the High Court of Justice go to the Court of Appeals, which consists of the Lord Chancellor, England's highest judicial officer, the Lord Chief Justice, and about a dozen other judges (some of whom also serve on the High Court of Justice). Normally, however, only three judges hear any given case.

On relatively rare occasions when cases are held to be of "general public importance," appeals are taken from the Court of Appeals (including the criminal division) to the House of Lords.[7] This ancient body has the final authority in interpreting English law and is in one sense comparable to the United States Supreme Court. Of course, the House of Lords is not a court. Its legal interpretations are in fact made by the Lord Chancellor and nine Law Lords who are specifically elevated to the peerage because of their legal acumen.

A word should be said about the Lord Chancellor. Although he is England's highest ranking judicial officer, his duties are quite different from those of the Chief Justice of the United States Supreme Court. While he does sit with the Law Lords and occasionally on the Court of Appeals, most of his time is spent in political and administrative activities rather than as a judge. He is a member of the Cabinet and participates in Cabinet decisions. As a Cabinet member, he is a political ally of the Prime Minister and he usually loses his position when a new Prime Minister comes to office. One of his most important functions is to appoint himself or recommend the appointment of all judges throughout the realm to the Prime Minister. Additionally, he is the Speaker of the House of Lords which means he must preside over that body's deliberations. In short, in the Lord Chancellor we see combined in one man some of functions of the United States Chief Justice, the Attorney General and the President pro-tem of the United States Senate.

Courts in general have less influence on English public policy than on United States public policy—at least in this century. There are two basic reasons for this. First, because there is no written English constitution, acts of Parliament cannot be found in violation of it and declared unconstitutional. In other words, English courts have no power

[6] Wales is included in the English judicial system.

[7] The House of Lords usually hears only those appeals certified to it by the Court of Appeal or by England's Attorney General, but the Lords occasionally decide to hear an appeal of their own accord.

of judicial review; all parliamentary acts must be enforced by the courts regardless of their content. Second, because England has a unitary system and not a federal one, the courts are not called on to reverse or modify local laws or policies which might be in conflict with national laws or policies. This is a legislative function in England, not a judicial one. It should not be thought that English jurists are not highly respected or influential in determining the shape of many areas of law, but it is fair to say that English judges exercise less control over public policy than do their American counterparts.

THE FRENCH SYSTEM

The judicial structure in France is somewhat complicated by the large number of specialized French courts. At the base of the structure are Courts of Instance which try misdemeanors and hear modest civil suits. Only one judge sits in such cases. Next in the hierarchy are the Courts of Major Instance. These courts have two divisions: a Correctional Tribunal for trying less serious felonies and hearing appeals from convictions in the Courts of Instance, and a Civil Section for hearing all important civil suits and appeals from less important cases decided in Courts of Instance. Judges assigned to one division do not hear cases in the other. Cases tried in either division are heard by an odd number of judges (usually three). Appeals from the Correctional Tribunal go to the Assize Court; in addition the Assize Court tries major felonies such as homicide. Appeals from the Civil Section go to the Court of Appeal (which has no original jurisdiction).

The highest court in France is called the Court of Cassation; it hears appeals on points of law from the Assize Courts and the Courts of Appeals. It is composed of 112 judges and hears appeals in panels ranging from 7 to 15 judges. The court takes its name from the French verb *casser* ("to break") and its function is to review interpretations of law decided by lower courts. If it determines that the lower court erred, it quashes or breaks its ruling and remands the case to another court for retrial. In the sense that its rulings are binding on all lower courts, the Court of Cassation is analogous to the United States Supreme Court. Its decisions, however, almost always focus on rather narrow points of law rather than on broad issues of public policy. Moreover, it has no power of judicial review and cannot render decisions applicable to government officers in their official capacity.

In addition to the ordinary courts described above, there are specialized courts of original jurisdiction located throughout France. Most notable are the Juvenile, Labor Relations, Farm Problems, Social Security and Commercial Law courts. Appeals from their decisions can be taken to the Courts of Appeals and beyond that to the Court of Cassation. On the criminal side, there is also a Permanent Court of State Security instituted during the Algerian crisis of the early 1960's which tries all cases involving subversion. Appeals from its verdicts go to the Court of Cassation.

THE ADMINISTRATIVE COURTS

Last but hardly least are the administrative courts. These courts alone hear complaints about the actions of government officials and have the power to rectify or nullify such actions. There are two levels of administrative courts, the Administrative Tribunals with original jurisdiction scattered throughout the country, and the Litigation Section of the Council of State in Paris with appellate jurisdiction.[8] The Litigation Section has about 80 members and is divided into 11 subsections for hearing appeals. Administrative courts do not have the power of judicial review; they cannot declare laws unconstitutional. They can, however, give citizens relief from the actions of government officials not sanctioned by ordinary statutes.

French judges exercise less influence on public policy than do either American or English judges. In part this is because

[8] The Council of State has five sections and various duties. Only the Litigation Section performs judicial functions. Other sections do such things as drafting legislation, advising Cabinet members and supervising the civil service.

French courts, like those in England, lack the power of judicial review[9] and do not operate in a federal system where they are charged with evaluating local laws and policies in terms of national ones. More basically, however, because the civil law tradition rather than the common law prevails in France, French judges are not expected to be so creative or influential in developing the law as are their common law counterparts in Britain and the United States.

JUDICIAL SELECTION

There is considerable contrast in both the philosophy and procedures governing the selection of judges and prosecutors among the three nations. In the United States, popular control and political factors are the dominant philosophical and practical concerns. In France, however, these concerns are of minimal importance; the emphasis is rather on the proper training of judges and prosecutors. In Great Britain, none of the above factors are paramount, but the British provide some consideration for each of them.

In the United States, all federal judges are appointed by the President, but the primary means of selecting judges in the states is by direct popular election.[10] In about 15 states, however, judges are appointed by the governor (sometimes from a list submitted by a lawyer-layman judicial selection commission) and even in elective states, governors are usually empowered to fill vacancies created by resignations or deaths. Where judges are elected, it is obvious that partisan or ideological factors can play an important role in determining who comes to the bench. But this is also true in the case of appointed judges. Presidents and governors seldom appoint men of the opposite political party and usually use their appointment power to reward men who have served them or their party.[11] The dominance of political factors in the selection process in the United States is enhanced by the fact that, with unimportant exceptions, there are no legal requirements for becoming a judge other than being an attorney (and this is not always necessary for justices of the peace, city magistrates and similar sorts of judges).

Federal prosecutors (United States district attorneys) are appointed by the President and are almost always the recipients of political patronage. They are under the control of the Department of Justice and must conform to the directives and policies the Attorney General lays down. Most state prosecutors are elected by voters in a given area. Few states have a department comparable to the United States Department of Justice, and consequently local prosecutors exercise almost complete discretion in prosecution decisions and tactics. More often than not the prosecutor is a relatively young lawyer with political ambitions; many move from the prosecutor's position to a judgeship while others seek executive office.[12]

JUDGES IN GREAT BRITAIN

All British judges are appointed either directly by the Lord Chancellor or by the Prime Minister, usually upon the Lord Chancellor's recommendation. Judges of the lowest civil and criminal courts need have no legal training. All others must be barristers of 10 years or more standing. (Barristers make up about 10 per cent of the English legal profession; their duties are confined to briefing and arguing cases. Solicitors, who are less prestigious, make up the other 90 per cent. They maintain contact with clients and perform more routine legal chores). Barristers receive much of their training at the Inns of the Court and constitute a kind of

[9] France does have a Constitutional Council which can declare certain types of laws unconstitutional. The Council, however, is not a court; it does not hear a case between adverse parties. Moreover, only high public officials can bring a challenge of a law's constitutionality before the Council. See Henry Abraham, *The Judicial Process*, 2nd Ed. (New York: Oxford University Press, 1968), pp. 296–99.

[10] Compared to other elected officials, incumbent state judges are often unopposed for reelection. But sometimes they can draw vigorous opposition. See Herbert Jacob, *Justice in America* (Boston: Little, Brown and Co., 1965), pp. 97–99.

[11] For a general discussion of this, see Jacob, *op. cit.*, pp. 89–97. For a detailed analysis of one state, see Richard Watson and Rondal Downing, *The Politics of Bench and Bar: Judicial Selections Under the Missouri Non-Partisan Court Plan* (New York: John Wiley, 1969), chaps. 1–5.

[12] For more discussion of prosecutors, see Jacob, *op. cit.*, chap. 5.

"fraternity" unknown in the American legal profession.[13]

Political factors are less important in the selection of British judges than they are in the United States. One reason is that the barristers' fraternity-like culture makes evaluation of a candidate's personal temperament and legal skills far easier for the Lord Chancellor and his advisers than for United States Presidents, governors or voters. Beyond that, there is a viable tradition in Great Britain that judgeships should go to men of outstanding legal abilities. Nonetheless, it would be misleading to say that political considerations are unimportant. The Lord Chancellor, as noted earlier, is a politician as well as a judge, and membership in or service to the incumbent party enhances a barrister's chances of becoming a judge.[14]

There are very few full-time prosecutors in England. Normally, when the police wish to prosecute an offender, they hire a private barrister. Great Britain has no governmental agency comparable to the United States Justice Department. While her Attorney-General and a few other high-ranking officials in the Home Office exercise some initiative and control in the area of criminal prosecutions, the position of local public prosecutor as it is exists in the United States or France is simply unknown in England.

In the Anglo-American countries, judges are lawyers and the judgeship usually culminates a long career of law practice. In France, however, the judges are not and never have been practicing lawyers; rather they have been judges (or in training therefore) all their adult lives. In other words, in France the legal profession and the judicial profession are two completely separate professions.

A young Frenchman must make his decision to become a judge early in life. He attends law school following a different curriculum than that established for lawyers and then must attend the National Center for Judicial Studies for four years. Admission there is determined by competitive examinations, but all entering students must be under 27. Upon graduation, the student is assigned to be a judge in a Court of Instance. As time goes on, he is promoted to judgeships in more important courts. The rapidity of his advancement depends upon his superiors' evaluation of his performance. Promotions are supervised by a Supreme Judicial Council composed of senior judges and Ministry of Justice officials. The Council cannot demote judges, however, except for very serious cause.

Being a prosecutor in France is also a lifetime profession involving both attendance at the National Center for Judicial Studies and promotion through the ranks supervised by the Supreme Judicial Council. French prosecutors not only represent the state in criminal cases but, unlike their American or English counterparts, are expected to intervene on behalf of society's interest, generally in civil cases where the state is not a party but the outcome is of public interest or importance.[15]

Because French judges and prosecutors are more or less self-selected at an early age and promoted in a manner similar to that of civil servants, partisan political considerations are seldom a factor in their appointments or promotion. In fact, they are considered civil servants and must forego taking any part in political campaigns or movements.

CRIMINAL JUSTICE

The American and British systems of criminal justice are very similar. They share a common law history and are both based on the premise that an *adversary* process is the optimal means of procuring justice. Because American criminal procedures have been analyzed in other articles in these issues of *Current History,* we shall not try to describe the

[13] The Inns were barristers' residences in medieval England. Today their primary function is to serve as a law school. See Abraham, *op. cit.,* pp. 89–92.

[14] For discussion of the role of political considerations in the appointment of British judges, see R. M. Jackson, *The Machinery of Justice in England,* 4th Ed. (Cambridge: Cambridge University Press, 1964), pp. 256–71.

[15] French prosecutors can become judges, although this is not a frequent career pattern. For a discussion of the French legal profession, see Rene David and Henry P. deVries, *The French Legal System* (New York: Occana, 1958), pp. 17–28.

Anglo-American system here. Rather, we shall describe the French system of criminal justice and note how it contrasts with the Anglo-American system. Before doing so, it should be emphasized that the French system is premised on the belief that the *inquisitorial* process best obtains justice. This system is fundamentally different from the adversary system, and in consequence many aspects of French criminal jurisprudence seem strange to those familiar only with Anglo-American notions of justice.

In France, criminal proceedings are divided into three rather distinct parts: the investigative phase, the examining phase, and the trial. The first phase, as the name implies, involves police investigation of the crime. It is not very different from police investigations in the United States or in Great Britain except that it is under the control and direction of the public prosecutor. In the Anglo-American countries, the prosecutor is seldom involved until the police complete their investigative work.

The examining phase, however, has no real counterpart in the Anglo-American system. Moreover, it is probably the most critical portion of French criminal procedure. The judge is the key figure here; it is he who asks questions of the witnesses (including the defendant) and builds a record of evidence and testimony in the case. The prosecutor and defense lawyer can consult with their witnesses and client and call the judge's attention to what they think are important questions, but they do not present evidence or ask questions of witnesses themselves. In fact, often the examining phase is not held at a particular time or place, but involves only the sending of written questions to witnesses or having the judge question them at varying times. When the examining phase is held in a particular time and place, it is not open to the public.

If, on the basis of the record, the examining judge believes that a crime was committed by the accused, the case goes to the trial phase. But such a trial is different from a trial in the Anglo-American system. Its function is not to introduce evidence and testimony; after all, the record has already been made in the examining phase and (with a few exceptions) cannot be altered for the trial phase. Rather, the function of the trial is to permit the prosecutor and the defense lawyer to argue their cases. Such argument can not only focus on disputed points in the record, but can cover the defendant as a person as well—his past behavior, his lifestyle and environment.

The trial is conducted before three judges (the examining judge cannot be among them) and nine jurors. The judges and jurors confer and vote together in determining guilt or innocence and, if guilty, in setting the sentence. Eight votes are required to convict. This procedure contrasts sharply with the American, where the jury retires to deliberate alone after the trial, uninfluenced by the judge. Moreover, in most Anglo-American jurisdictions, the jury only determines guilt or innocence while the judge sets the penalty. And most Anglo-American juries must reach a unanimous verdict; failure to do so produces a "hung" jury and leads to a retrial of the defendant.[16]

PHILOSOPHIC DIFFERENCES

As indicated earlier, basic philosophical differences separate the Anglo-American and French criminal justice systems. The Anglo-American procedure is—as the name *adversary* implies—basically a contest, a game of wits and strategy (epitomized in our culture by television hero Perry Mason) between the state and the defendant. Each side is primarily interested in winning—not in truth or justice. However, truth and justice will usually prevail, advocates of the system maintain, because with each side ready and able to challenge the falsehoods and illogical inferences of the other, impartial judges and jurors will be able to discern the truth. But because individual dignity is the cornerstone of our governmental system and because the state has so much more power, prestige and resources than the defendant, the rules of

[16] England and a few American states permit juries to render verdicts with a less than unanimous vote. Some states require the jury rather than the judge to set the penalty upon conviction.

the game must be structured to strengthen the defendant's position and minimize the state's advantage—in order to make the game fairer.

In the inquisitorial system, on the other hand, truth-seeking is the direct goal of the system, not a by-product of a game situation. This is why the judge is the all important figure in the examining phase. As a neutral party, he is expected to bring forth all evidence, regardless of which side it favors or condemns. The would-be game players—the prosecutor and defense attorney—have only sideline roles until all the evidence is accumulated; then they can ask the court to look at the truth from differing perspectives. Because the inquisitorial philosophy is less concerned with the power differential between the state and the defendant and the protection of individual rights and more concerned with finding truth directly, fewer special protections for the accused are built into the system.[17]

Thus, in the French system, the defendant is subject to questioning and his answers constitute part of the evidence. In the Anglo-American system, by contrast, the state must make its case without any help from the opposition, and defendants cannot be compelled to testify. Moreover, no inference of guilt can be drawn from their failure to do so. Likewise, in the French system all relevant evidence is admissible to the examining phase and trial, and even evidence not strictly related to the crime (such as information about previous convictions) can be admitted. In the Anglo-American system, irrelevant evidence is not admissible and even certain types of relevant evidence must be excluded from the trial. For example, hearsay evidence, evidence secured without a search warrant,[18] or secured from a defendant who was not informed of his constitutional rights during interrogation cannot be admitted.[19]

CIVIL JUSTICE

As is the case with criminal justice, civil jurisprudence (i.e., non-criminal) is much the same in the Anglo-American countries, while the French system stands in some contrast. However, this contrast is less clearly attributable to differing philosophical bases and is more the result of differing patterns of historical development in the institutions comprising the nations' legal systems.

One such contrast occurs in suits for damages. In the United States, many such cases are heard by a jury which ordinarily decides both the verdict (who wins) and the amount of compensation. Jury trials take considerably more time than non-jury trials and the large number of such trials is one reason for clogged dockets and long delays in American courts. Beyond this, many lawyers complain that in complex suits the average juror simply cannot understand the law or the evidence. Because of these difficulties, the right to a jury trial in damage suits is highly restricted in Great Britain and only a small minority of such cases are settled in this manner. Most are heard by a judge alone. In France, the idea of a jury trial in a damage suit is unknown. In fact, a trial, as it is known in the Anglo-American courts, never occurs. Court officials receive evidence and conduct interrogations at various times mutually convenient to those involved. When a record is completed, it is presented to the judges who render a decision after studying it.

In damage suits and most other civil cases Anglo-American rules governing the admissibility of evidence and sufficiency of evi-

(*Continued on page 113*)

[17] For further discussion of the adversary and inquisitorial philosophies, see Merryman, *op. cit.*, chap. 17.

[18] See *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Such evidence is admissible in Great Britain.

[19] See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The rules set forth in the *Miranda* decision are rather similar to the so-called Judges' Rules in Great Britain requiring that suspects be warned of their rights. See Jackson, *op. cit.*, pp. 136–38.

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BOOK REVIEWS

ON JUSTICE

JUSTICE DENIED: THE CASE FOR REFORM OF THE COURTS. By Leonard Downie, Jr. (New York: Praeger Publishers, 1971. 217 pages, bibliography and index, $6.95.)

That justice is being denied to many Americans in almost all walks of life is obvious to any concerned reader in this field, or to anyone who takes the trouble to investigate conditions in his local courthouse or jail. As Leonard Downie points out: "It is not enough for worried Americans to lock their doors. . . . It is not enough to complain that the law is wrong, the courts are unresponsive, the judges lazy and the lawyers greedy.

"It is time instead for citizens to go down to the local courthouse, look around, and learn to understand what happens there. . . ."

In this study, Leonard Downie of the *Washington Post* has made a clear case for reform of the courts. He writes of criminal courts which resemble "sausage factories," of plea bargaining which is a travesty of justice, of the criminal courts which ignore "the fates of defendants and crime victims alike, blotting them out as human beings . . ." because "the necessity to move cases quickly is the central need."

He describes the "revolving door problem," the in-and-out-of-jail of the chronic alcoholic who is never treated and (needless to say) never cured in his contact with the system. He writes of the heroin addict, labeled as a criminal and forced into a life of crime by his disease, and points out that the addict cannot be cured by being treated as a criminal. He underlines the struggles of the poor with the system and the problems now being faced by the middle class citizen who cannot afford competent legal help and is discovering that "the law" is against him, too. Pleading for reform in the courtroom and the law school, Downie concludes that "We must resolve now to begin the difficult task of reestablishing justice in our trial courts and making the law work . . . for all Americans. *Justice Denied* deserves a wide readership."

O.E.S.

SENTENCING IN A RATIONAL SOCIETY. By Nigel Walker. (New York: Basic Books, 1971. 202 pages, appendices, bibliography and index, $6.95.)

Nigel Walker is University Reader in Criminology and Professorial Fellow of Nuffield College, Oxford, and his study of *Sentencing in a Rational Society* reflects his concern for our ignorance about sentencing, penal systems, and what we hope to accomplish in this field. He discusses the aims of a penal system, the techniques of crime reduction, the efficacy of correctives and the scope of criminal law, and urges consideration of a more pragmatic, "strategic approach" to sentencing. In the author's own words: "This book was written for a particular sort of society: one which is peaceful, affluent and ignorant, but aspires to rationality."

Nigel Walker attacks some old myths and traditions and succeeds in offering a fresh viewpoint in a book that is at the same time scholarly, witty and well written indeed.

O.E.S.

LAW AND ORDER: POLICE ENCOUNTERS. Edited by Michael Lipsky. (New York: Aldine Publishing Company, 1970. 144 pages, $2.45.)

This collection of articles from *Transaction* magazine prepared by Michael Lipsky, an associate professor of political

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CURRENT DOCUMENTS

Sheppard v. Maxwell, 1966

In 1966, in a far-reaching ruling on the limitations of the press with regard to publicity of a murder trial, the Supreme Court ruled that the defendant was deprived of his right to a fair trial because of "the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution." Excerpts from the ruling follow:

MR. JUSTICE CLARK *delivered the opinion of the Court.*

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution. The United States District Court held that he was not afforded a fair trial and granted the writ subject to the State's right to put Sheppard to trial again. . . . The Court of Appeals for the Sixth Circuit reversed. . . . We granted certiorari . . : [and] . . . have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore home in Bay Village, Ohio, a suburb of Cleveland.

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From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. . . . At the end of the interrogation Shotke (an interrogator) told Sheppard: "I think you killed your wife." Still later in the same afternoon a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon—later the chief prosecutor of Sheppard—sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline "Testify Now In Death, Bay Doctor Is Ordered," one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. . . . The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Re-tells Story." . . . The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum."

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected. . . ." The following day, July 21, another page-one editorial

was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing the Coroner announced that he "could" order Sheppard held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence. . . . The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of women who were allegedly involved with him. The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes.

. . . A front-page editorial on July 30 asked: 'Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that '[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling. . . . " It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned—having been denied a temporary delay to secure the presence of counsel—and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: 'I Wish There Was Something I Could Get Off My Chest—but There Isn't.' " Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: " 'I Will Do Everything In My Power to Help Solve This Terrible Murder.'—Dr. Sam Sheppard." Headlines announced, *inter alia,* that: "Doctor Evidence Is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard 'Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." On August 18, an article appeared under the headline, "Dr. Sam Writes His Own Story." And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: "I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?" We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December, 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors. . . .

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill

vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

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All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. . . . Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

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The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at *voir dire* to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective jurors appeared daily.

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We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. . . .

2. On the second day of *voir dire* examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer. . . ." The two brothers of the accused were described as "Prosperous, poised. His two sisters-in-law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author —through quotes from Detective Chief James McArthur—assured readers that the prosecution's exhibits would speak for Marilyn. . . .

4. . . . [T]he jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjuror and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. . . .

6. On November 24, a story appeared under an eight-column headline: "Sam Called A 'Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr Jekyll and Mr. Hyde" character. No such testimony was ever presented at the trial. The story went on to announce: "The prosecution

as a 'bombshell witness' on tap who will testify to Dr. Sam's display of fiery temper—countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. . . .

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of eavenging. . . ."

8. On December 9, while Sheppard was on the witness stand, he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: "'Barefaced Liar,' Kerr Says of Sam." Captain Kerr never appeared at a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. . . . [T]he jurors were permitted to use the phones in the bailiffs' rooms. . . . The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that his ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." *In re Oliver*, 333 U.S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for "[w]hat transpires in the courtroom is public property." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). . . . And where there was no threat or menace to the integrity of the trial, *Craig* v. *Harney*, *supra*, at 377, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California*, . . . (314 U.S. 252, 271). And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers* v. *Florida*, 309 U.S. 227, 236–237 (1940). "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp* v. *Florida*, 328 U.S. 331, 347 (1946). But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." *Cox* v. *Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting). . . .

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907): "The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." . . .

Only last Term in *Estes* v. *Texas*, 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there: "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. . . ."

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case.

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The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution. . . . For months the virulent publicity about Sheppard and

the murder had made the case notorious. . . .

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." . . . The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. . . . The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. . . .

There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

"Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life. . . ." Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.

Much of the material printed or broadcast during the trial was never heard from the witness stand. . . . As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during the trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. . . .

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge.

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. . . .

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courthouse during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. . . .

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. . . . Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the

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CHIEF JUSTICE WARREN BURGER ON LAWYERS

In a speech before the American Law Institute on May 18, 1971, Warren Burger, Chief Justice of the United States Supreme Court, scored what he described as a "decline in civility" in some quarters of American life and asked the legal profession to work out stronger methods of dealing with impolite lawyers in court. Excerpts from his speech follow:

With passing time I am developing a deep conviction as to the necessity for civility if we are to keep the jungle from closing in on us and taking over all that the hand and brain of man has created in thousands of years, by way of rational discourse and in deliberative processes, including the trial of cases in the courts.

Whether in private negotiation or public discourse, in the legislative process or the exchanges among leaders, in the debate of parties, or the relatively simple matter of a trial in the courts, the necessity for civility is imperative. Without civility no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective.

When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat. I hardly dare take the risk of adding that this may also be relevant to the news media.

Today more and more new and vexing problems reach the courts, and they call for the highest order of thoughtful exploration and careful study. Yet all too often, overzealous advocates seem to think the zeal and effectiveness of a lawyer depend on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters—including the judges.

A large part of the new litigation involves the rights of the whole of society, or claims of so-called "new property," or new constitutional theories or what some advocates describe as "political cases."

At the drop of a hat—or less—we find adrenal-fueled lawyers cry out that theirs is a "political trial." This seems to mean in today's context—at least to some—that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant.

This is not a wholly new phenomenon. A century ago the courts of England, now a model of the disciplined, calm civility that is essential to a trial, were plagued by the misconduct and incivility of lawyers and judges alike. Judges improperly interposed their views on counsel witnesses, lawyers bullied and baited each other and the adverse witnesses.

The role of the press is a crucial one. Sometimes their highest service is to reflect precisely the conduct of the brash and swaggering lawyer or intemperate, blustering judge.

History records numerous episodes of physical attacks by members of Congress on their fellow members. Pistol-whipping and caning escalated from verbal attacks. News media were intensely partisan and vicious, and it was not uncommon for political leaders to horsewhip newspaper reporters.

Today, and increasingly in the past few years, we witness some of this kind of incivility as well as violence. Speakers are shouted down or prevented from speaking. Editorials tend to become shrill with invective and political cartoons are savagely reminiscent of a century past.

Now I am overlong in making my case for the relevance of all this to a gathering of the A.L.I.

I submit that with a gathering that includes some of the leading scholars, teachers, lawyers and judges in the land, few subjects could be more relevant to discuss than the necessity for civility in the resolution of litigation in a civilized society.

I suggest this is relevant to law teachers because you have the first and best chance to inculcate in young students of the law the realization that in a very hard sense the hackneyed phrase "order in the court" articulates something very basic to the mechanisms of justice. Someone must teach that good manners, disciplined behavior and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat. Many teachers of law have thought teaching these fundamentals was not the function of law schools.

With all deference, I submit that lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice.

And without undue deference, I say in all frankness that when insolence and arrogance are confused with zealous advocacy, we are in the same trouble the courts of England suffered through a century ago. Today English barristers are the most tightly regulated and disciplined in the world and nowhere is there more zealous advocacy.

I suggest the necessity for civility is relevant to lawyers because you are the living exemplars—and thus teachers—every day in every case, and in every court and your worst conduct will be emulated perhaps more readily than your best. When you flout the standards of professional conduct once, your conduct will be echoed in multiples and for years to come.

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PRETRIAL CRIME NEWS

(*Continued from page 74*)

the bench, do not seek political advancement by reputation-building publicity, as they often do in this country. In the United States, elected judges, fearful of the retaliatory power of the press, could not be expected to use their contempt power fairly and judiciously to curb abuses by the media. Those most tempted to use contempt might be the dishonest ones who would see in such power an offensive weapon to divert attention from their own or their accomplices' misconduct.

UNDESIRABLE EFFECTS

Alfred Friendly, associate editor of the *Washington Post,* summed up some of the undesirable effects that could be produced by a flat legal curtailment of all information that might prejudice the outcome of criminal litigation. If police and court authorities in some city connive to railroad an innocent man or to put the fix in for a guilty man who has connections, how is the public to know of evidence never presented or of circumstances kept in the dark? Under a limit enforced by legal sanctions, an insider with knowledge of what is happening would have to risk disbarment, fine or imprisonment (depending on the specified penalties) for telling the media that a full disclosure of the facts is not being made. An information curb could be used with special effectiveness where the power structure of closed communities, as in some cities in the South, could apply the prohibition to camouflage a double standard of justice—one for whites and another for blacks—with the outside world kept in the dark if the black defendant were being framed and the white law violator were being let off.

Other unwanted results could flow from an absolute barrier against the release of details in the initial stage of a criminal case. An indicted party, whose conduct might be at least partly excused by extenuating circumstances, would be prevented from explaining his side. In some situations, the publicizing of details might bring forth witnesses or information helpful to the defense.

Besides the undesirable direct impact on criminal cases that might be brought about by a tight restriction on information, we must also consider the effect that such a policy might have in general on proper press surveillance of public officials. Under the theory behind the First Amendment's guarantee of freedom of the press, the media should be the watchdog of the judicial as well as the executive and legislative arms of government. It should have maximum freedom to report on and criticize the government, including police departments and courts, which are just as capable of error, dishonesty and tyranny as any other official agencies. If the power of censorship were conferred on certain officials, these officials might well use it to cover the mistakes or misconduct of law enforcement officers and the courts or to prevent justifiable criticism. The record of biased or lawless law enforcement in the United States does not indicate that police departments, district attorneys' offices and judges should be further removed from the prying eyes of the media.

Despite the fact that some practices of the media are offensive to due process, the proper remedy is not to "try" the offender, to "convict" it and restrict its liberty. Under the American system of checks and balances, the courts and the media both play roles which are given high priority in our constitutional system—the courts, the function of insuring justice for individuals; the press, the function of securing for the public an independent scrutiny of governmental agencies, including the courts. Neither of these vital institutions should hold pervasive sway over the other.

MILITARY JUSTICE

(Continued from page 81)

Perhaps the ultimate corrective, because of the nature of military institutions, must be found in the slow development of military custom. In the rapidly changing world of the "now" generation, this may not be fast enough.

NEED FOR JUDICIAL REFORM

(Continued from page 70)

prior to the bail stage there is considerable controversy over how to make the police more efficient in apprehending criminals while at the same time complying with constitutional requirements relating to searches and interrogation.[14] Likewise subsequent to the appeal and judicial review stage, there is considerable controversy over how to make prisons more rehabilitative while at the same time providing a negative deterrence to criminality.[15]

A CHANGING ENVIRONMENT

The fact that reform is needed does not necessarily indicate that the American system of justice has been inefficient or discriminatory as measured by past standards. It does indicate that the American environment is changing with regard to urbanization which affects efficiency, and that middle class Americans are becoming more sensitive to discriminatory injustices that were formerly tolerated. It is certainly encouraging to note that in recent years the courts and other policy-making bodies have instituted numerous innovations to attempt to resolve the problems raised by pretrial release, legal aid, court delay, pretrial reporting, judicial selection, the jury system and judicial review, although more still remains to be done.[16]

[14] For further detail on police efficiency, see O. W. Wilson, *Police Administration* (New York: McGraw Hill, 1963); Jerome Skolnick, *Justice without Trial: Law Enforcement in a Democratic Society* (New York: John Wiley, 1967); and other articles in this symposium.

[15] For further detail on prison reform, see Daniel Glaser, *The Effectiveness of a Prison and Parole System* (Indianapolis: Bobbs-Merrill, 1964); Paul Keppan, *Crime, Justice, and Correction* (New York: McGraw-Hill, 1960); and other articles in this symposium.

[16] For further detail on judicial or justice reform in general, see Howard James, *Crisis in the Courts* New York: McKay, 1968); Arthur Vanderbilt, *Minimum Standards of Judicial Administration* New York: National Conference of Judicial Councils, 1949); American Bar Association, *Minimum Standards for Criminal Justice* (Inst. of Judicial Administration, a series of booklets published from 1967 on); and other articles in this symposium.

BRITISH, FRENCH AND AMERICAN JUSTICE COMPARED

(Continued from page 104)

dence needed to support a verdict are rather strict and detailed. Failure to adhere to them is likely to lead to a reversal of the decision on appeal. French courts, by contrast, are governed by far fewer and (in general) more vaguely defined rules of admissibility and proof. The guiding principle of French jurisprudence is that the verdict should be rendered according to the judges' own strongest convictions, regardless of the logic or preponderance of evidence. In appeals, however, the losing party can argue not only that proper procedures were not followed (as in the United States and England), but the merits of the case as well.[20]

Finally, Anglo-American judges possess a power termed *equity* which their French counterparts lack. Equity is highly important to the Anglo-American judicial system, but is unknown in French law. It is the power a judge has to shape a non-monetary remedy most appropriate to a particular situation (e.g., an order requiring the reinstatement of a student suspended for having long hair, or forbidding a firm from establishing a junkyard across the street from a house). The judge develops the remedy based on general principles of right and wrong and not on specific statutes. Equity is a very flexible and useful tool. It not only allows the settlement of disputes not covered by laws or precedents, but it permits them to be handled before the damage becomes irrevocable. Needless to say, equity gives Anglo-American judges a fair degree of power and influence in their community. Lacking the power of equity or anything similar, French judges have less leeway and thus less importance. As noted earlier, they are much more closely bound by the codes in making decisions. Moreover, the codes are oriented toward compensation rather than the prevention of damages before they occur.

[20] For further discussion of French civil trials, see Merryman, *op. cit.*, chap. 1.

CONCLUSION

There are some differences in the judicial systems between the United States and Great Britain. There are even more between the two Anglo-American nations and France. Those interested in reform of particular aspects of our judicial structure or procedures can certainly profit by studying how these aspects are handled in other countries. Clearly, for example, the infrequent resort to jury trials in English civil cases and the use of inquisitorial procedures in French criminal trials has much to recommend it.

Yet a word of caution is in order. Judicial systems are not only the product of reasoned debate and legislation, they are also the result of irrational historical developments and current patterns of social and political thinking. All successful judicial systems must have popular support. And in some situations, the grafting of a procedure or structure which works well in one country onto the judicial system of another may engender more problems than it solves.

BOOK REVIEWS

(Continued from page 105)

science at the Massachusetts Institute of Technology, includes an article on "police brutality," one on "crime, victims and the police," and one on the "breakdown in law and order," among others. Each article gives specific details and all are useful in a study of the police role in the American system of justice. O.E.S.

SUPREME COURTS IN STATE POLITICS. By Henry Robert Glick. (New York: Basic Books, 1971. 156 pages and index, $6.95.)

This second volume in the "Studies in Federalism" series from Temple University studies the role played by the judiciary in four states: Louisiana, Pennsylvania, New Jersey and Massachusetts, to determine the importance of the judicial role and the political philosophy of state judges and their importance. Tables and footnotes add to the value of this brief work. O.E.S.

CHIEF JUSTICE BURGER

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Finally, civility is relevant to judges, and especially trial judges because they are under greater stress than other judges, and subject to the temptation to respond in kind to the insolence and bad manners of lawyers.

I urge that we never forget the necessity for civility as an indispensable part—the lubricant—that keeps our adversary system functioning. If we want to protect that system we must firmly insist on the lubricant.

JURY SYSTEM REFORM

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as they have been painted or they would not have survived for so many centuries.

If history is any guide, the upshot of the controversy over the jury system will be some sort of compromise. The pressures for reform are very strong, and there are some signs of give in the present structure. Some states are already experimenting with smaller juries. The United States District Court in Minnesota made 6-man juries mandatory for most of its civil cases at the beginning of 1971. Such a mini-jury has been used on occasion in California. The way has been cleared for a wide use of smaller juries by a Supreme Court decision in June, 1970, which upheld the use of less than 12 jurors in criminal trials. This decision overruled a position taken by the Court 72 years earlier.[12]

Other suggestions which have been advanced to speed jury trials have included: an examination of the contingent fee system which gives an attorney a vested interest in getting as large a judgment as possible against a party being sued, and which may have a harmful effect on litigation as a whole; the use of audio-visual equipment to obviate repetition in such things as taking depositions, pretrial hearings, and so on. The use of less than unanimous verdict has also been suggested. Some critics have advanced the concept of standardized instructions to the

[12] *The Washington Star*, June 22, 1970, p. A-1.

jury, but this has been criticized on the grounds that in order to avoid reversible error, the instructions would have to be made more abstract. Audio or visual recording of the judge's charge might preclude the necessity of the jury's repeated requests to hear part of a charge over again.

These various suggestions by no means exhaust the list. But they do give a good idea of the innovative thinking currently going on in the legal community. Perhaps some of these ideas will find their way into accepted practice in the near future. If so, let us hope they result in the genuine improvement of the jury trial, from the standpoint of both speed and fairness. For improvements in the American system of jury trial can only strengthen an institution which, whatever its current faults, continues to enjoy the support of a great many Americans.

SHEPPARD V. MAXWELL

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testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public.

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. . . .

More specifically, the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. . . . Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of the publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. In addition, reporters who wrote or broadcast prejudicial stories could have been warned as to the impropriety of publishing material not introduced in the proceedings. . . . In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extra-judicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent their processes from prejudicial outside interference. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

CRIMINAL COURT LOGJAM

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would in most cases almost certainly bring about more equitable and sensible handling of these problems and transactions.

Finally, a very few voices in the legal community have also urged that even basic substantive court procedures that have long been taken for granted should be reviewed critically and possibly changed, no matter how deeply rooted they may be in the Anglo-American legal tradition. Everything done in the courts, they argue, should be held up to merciless scrutiny.

Even with the leadership of the Chief Justice of the U.S. Supreme Court, it will not be easy to make sweeping court reform the kind of compelling national quest that, for instance, put a man on the moon. In addition to the self-protective resistance of much of the legal profession and the apathy of the rest of the citizenry, there will doubtless be a general reluctance to question or change legal traditions that have become a part of our culture even though they may produce no assurance of justice and are not even based on constitutional directives—such as the notion of what constitutes a crime or the tradition of having all legal disputes decided by a jury of twelve fellow citizens.

Much of the change will have to be effected politically. But such change can easily be frustrated. Will politicians risk losing popularity among constituents by voting to legalize narcotics possession, gambling, prostitution, drunkenness, or homosexual activity? Will the majority of legislators who are also lawyers turn their backs on self-interest to help achieve changes bitterly opposed by the bulk of their profession? Will politicians in influential positions of power and the party bosses who helped put them there gladly give up the privilege of deciding who becomes a judge or a court clerk?

The problem facing the ordinary American, who now complains that the laws and courts do not seem to work right, is threefold. He must be willing to spend the money to make significant improvements in the local trial courts. He must force lawyers and legislators to realize that court reform must come and persuade them to work to change the laws and court procedures accordingly. And, to accomplish the latter, he must inform himself of and involve himself in what goes on in his local courthouse.

It is not enough for worried Americans to lock their doors, buy guns, complain about Supreme Court decisions, or, conversely, to criticize those who do. It is not enough to complain that the law is wrong, the courts are unresponsive, the judges lazy, and the lawyers greedy.

It is time instead for citizens to go down to the local courthouse, look around, and learn to understand what happens there and then, perhaps, to go to the local bar association or form a committee to ask questions about what is wrong in the court and demand satisfactory answers and reforms. The many new "public service" law firms being organized by bright young lawyers who want to bring about social change through legal, nonviolent means might be interested in bringing taxpayers' suits to force reforms in the trial courts. Certainly, if enough citizens made clear their concern—as they have done on the problem of pollution, for instance—local, state, and national politicians could be convinced that they had better explore and act on court reform if they wish to remain in office.

To accomplish this, it is necessary to make court reform one of the great domestic issues of the 1970's. Those people now deeply concerned about crime, racial injustice, pollution, poverty, and the exploitation of consumers will have to be brought to realize that little can be done to treat these ills unless the nation's trial court system is first made to function well and respond to injustice. The Rule of Law will not exist for any group of aggrieved citizens until the judicial system once again works properly. We must resolve now to begin the difficult task of reestablishing justice in our trial courts and making the law work, as it should, for all Americans.

THE MONTH IN REVIEW

A CURRENT HISTORY chronology covering the most important events of June, 1971, to provide a day-by-day summary of world affairs.

INTERNATIONAL

Berlin Crisis

June 7—The ambassadors of Britain, France, the United States and the Soviet Union, following their 21st meeting, report "encouraging progress" in their talks on the status of Berlin.

European Economic Community (Common Market)

(See also *Australia*)

June 3—Following talks in London with Geoffrey Rippon, Britain's chief negotiator with the E.E.C., the 14 Commonwealth sugar-growing countries endorse the terms obtained for them by Britain in her bid for Market entry.

June 5—The Common Market Executive Commission announces a plan calling for a $500-million expenditure between 1972 and 1976 to stimulate investment and create 300,000 new jobs in depressed farming areas.

June 23—In Luxembourg, British and E.E.C. negotiators reach agreement on the terms for British entry into the organization; the agreement must be ratified by the British Parliament.

International Court of Justice

(See also *South Africa*)

June 21—The Court, meeting in The Hague, says in an advisory ruling that South Africa is occupying South-West Africa illegally and calls for the immediate cessation of its administration of the territory.

Middle East

(See also *Jordan; U.S.S.R.; U.A.R.*)

June 9—In an address to the *Knesset,* Israeli Premier Golda Meir discusses the Soviet-Egyptian treaty of May 27 and calls for increased U.S. aid to Israel to maintain the arms balance in the Middle East.

June 12—Delegates from 14 Arab League countries, 4 Persian Gulf emirates and the Palestine Liberation Organization attend the opening session of a 10-day conference in Syria on the tightening of the economic boycott of Israel.

June 13—Premier Meir, at a meeting of the *Knesset,* reports that on June 11 a Liberian tanker carrying crude oil to Israel was fired upon by an unmarked launch at the southern end of the Red Sea. The Popular Front for the Liberation of Palestine claims responsibility for the shelling.

June 19—The Israeli military command reports that Israeli antiaircraft guns unsuccessfully fired upon 2 Egyptian jets flying over Israeli positions along the Suez Canal today.

June 29—A military spokesman in Lebanon announces that Israeli troops crossed into Lebanese territory today and fought with the Lebanese Army.

North Atlantic Treaty Organization (NATO)

(See also *Malta; Portugal; U.S.S.R.; U.S., Foreign Policy*)

June 3—In Lisbon, at the opening session of a 2-day ministerial council meeting of NATO, U.S. Secretary of State William Rogers proposes that the deputy foreign ministers of the organization meet later this year to consider opening negotiations with the U.S.S.R. on troop reductions in Central Europe.

June 4—In a communiqué issued at the close

of the Lisbon sessions, the foreign ministers of the NATO countries announce a decision to seek exploratory talks with the Soviet Union on "mutual and balanced force reductions" in Central Europe.

Organization for Economic Cooperation and Development

June 8—At the conclusion of a 2-day conference in Paris, delegates from 23 nations agree to the proposal by U.S. Secretary of State William Rogers to set up a high-level study group to seek to resolve the growing number of trade problems.

Organization of African Unity

June 18—Representatives of the Ivory Coast, Gabon, Dahomey, Upper Volta and Togo walk out of a session of the O.A.U. foreign ministers' meeting when the meeting refuses to delay debate on whether African states should engage in a diplomatic dialogue with South Africa.

June 21—Only 10 of the 41 heads of government of the member nations attend the opening meeting of the 8th summit conference of the O.A.U.

June 23—In a 28-to-6 vote, with 5 abstentions, the O.A.U. reaffirms its opposition to any moves by black states to establish diplomatic contacts with the white government of South Africa.

War in Indochina

(See also *U.S., Foreign Policy*)

June 3—North Vietnam announces that it is cancelling all arrangements to receive 13 sick and wounded prisoners of war from South Vietnam because only 13 of the original 570 prisoners involved are to be repatriated.

At the request of South Vietnam, U.S. bombers and helicopter gunships stage heavy attacks on North Vietnamese and Vietcong forces at Snoul and the Chup rubber plantation in Cambodia.

June 6—Reports indicate that sharp clashes between South Vietnamese and U.S. forces and North Vietnamese troops are continuing near Khesanh and Quangtri in South Vietnam.

June 8—The pro-Communist Pathet Lao and its ally, the Lao Patriotic Front, reject Laotian Premier Souvanna Phouma's proposal for peace talks without any preconditions.

June 10—The Cambodian command again reports North Vietnamese attacks east of Pnompenh.

At a news conference following a session of the Paris peace talks, North Vietnamese and Vietcong representatives say that if the U.S. sets a date for troop withdrawal, they will discuss a full exchange of prisoners without relation to other issues.

June 11—Cambodia's acting Premier, Lieutenant General Sisowith Sirik Matak, broadcasts an appeal for international control of a demilitarized zone encompassing the ruins at Angkor Wat and Angkor Thom.

June 15—South Vietnamese military spokesmen report that South Vietnamese paratroopers have succeeded in lifting an enemy siege of an artillery outpost in the Central Highlands of South Vietnam.

June 24—Le Duc Tho, a "special adviser" to the North Vietnamese delegation at the Paris peace talks, returns to Paris after an absence of more than a year.

June 27—Military sources report that at least 2 North Vietnamese regiments have infiltrated into South Vietnam across the demilitarized zone. Heavy North Vietnamese attacks continue in Quangtri Province; U.S. B-52 bombers continue raids on the northwest corner of South Vietnam.

AFGHANISTAN

June 9—An announcement from the Royal Palace indicates that Afghanistan's Ambassador to Rome, Abdul Zahir, has been appointed Prime Minister; he succeeds Noor Ahmad Etamadi, who resigned on May 17.

AUSTRALIA

June 4—Deputy Prime Minister J. Douglas

Anthony criticizes Britain for the problems Britain is causing in her bid for entry into the European Economic Community.

June 12—Neville Bonner is endorsed by the Queensland State Parliament to fill a seat in the Australian Senate; he is the first aborigine member of any Australian parliament.

BULGARIA

(See also *West Germany*)

June 8—Bulgaria lifts a ban on charter flights from West Berlin to resorts on the Black Sea coast.

CAMBODIA

(See *Intl, War in Indochina*)

CANADA

June 4—Canadian and Soviet representatives sign a contract in Ottawa for the sale of 81.5 million bushels of Canadian wheat to the U.S.S.R. for approximately $145 million.

CEYLON

June 9—Schools reopen; they have been closed since early April because of guerrilla insurgency.

CHAD

June 20—Officials report that 2 French soldiers, who were in a joint French-Chadian force that engaged in a battle with some 80 to 100 rebels, have been killed.

CHILE

June 8—President Salvador Allende Gossens imposes a state of emergency on Santiago Province and puts military units on alert throughout Chile in the wake of the assassination of Edmundo Pérez Zukovic, who was Minister of the Interior under former President Eduardo Frei Montalva.

June 10—Spokesmen for the Communist and Socialist parties charge that the U.S. Central Intelligence Agency was involved in the assassination.

June 13—Two left-wing extremists, accused of the slaying of Pérez Zukovic and reportedly connected with the People's Organized Vanguard, are killed in a gun battle with police.

June 16—Salazar Bello, a friend of the 2 men accused of the slaying of Pérez Zukovic, attacks police headquarters; after killing 2 detectives, he commits suicide.

CHINA, PEOPLE'S REPUBLIC OF (Communist)

(See also *U.S.S.R.; U.S., Foreign Policy*)

June 1—Rumanian President Nicolae Ceausescu arrives in Peking on a state visit and is welcomed by Premier Chou En-lai.

June 3—Ceausescu meets with Mao Tse-tung, Communist party chairman.

June 9—In a joint communiqué issued at the conclusion of his visit, Ceausescu urges China to normalize her relations with the West in the interests of world peace.

Yugoslav Foreign Minister Mirko Tepavac arrives in Peking for a week-long visit.

June 21—Chou En-lai declares that the security screen that the U.S. has erected around the island of Taiwan hinders the establishment of diplomatic relations with the U.S.; he also says that his government will consider proposals by the Soviet Union for a 5-power disarmament conference.

CHINA, REPUBLIC OF (Nationalist)

June 9—At a news conference prior to his departure for Japan, U.S. Ambassador at Large David M. Kennedy says that progress has been made in solving a number of Taiwanese-American economic problems including the textile issue.

June 12—The Central News Agency reports that yesterday the Ministry of Foreign Affairs protested the agreement for the transfer of Okinawa and the other Ryukyu Islands from the U.S. to Japan; the agreement calls for the transfer of the Senkaku Islands to Japan; they are also claimed by Taiwan.

COLOMBIA

June 1—All but one of the 12 members of the Cabinet resign; the move will enable President Misael Pastrana Borrero to reshuffle the coalition government.

CONGO (Kinshasa)

June 7—Radio broadcasts order Lovanium University students to report to the campus for conscription into the army; the government ordered the closing of the university and the conscription of students on June 5 following an outbreak of student rioting.

CUBA

June 2—The passengers and crew of a hijacked Pan American jet are released after being held for 4 days.

June 15—The official newspaper, *Granma,* reports that 5 U.S. citizens have been found guilty of illegally entering Cuban waters and have been fined a total of $100,000.

CZECHOSLOVAKIA

June 3—*The New York Times* reports that Antonin Novotny, the former President and Communist party leader of Czechoslovakia, has been given back his membership in the party.

FRANCE

June 1—Finance Minister Valéry Giscard d'Estaing, after conferring with Soviet Foreign Trade Minister Nicolai Patolichev, announces that the Soviet Union will help build an oil refinery in France.

June 13—At a 3-day congress, the Socialist party merges with François Mitterrand's Convention of Republican Institutions and a number of smaller left-wing groups.

GERMANY, DEMOCRATIC REPUBLIC OF (East)

June 15—The heads of 6 foreign Communist parties attend the opening session of the eighth East German Communist party congress meeting in East Berlin.

June 16—Leonid Brezhnev, First Secretary of the Soviet Communist party, addresses the party congress.

June 17—A.D.N., the East German press agency, reports that President Walter Ulbricht suffered "an acute circulatory disturbance" on June 14; Ulbricht has been absent from the party congress sessions.

June 18—Addressing the party congress, Premier Willi Stoph discusses the country's economic difficulties.

June 19—The party congress reelects Erich Honecker as First Secretary at its concluding session.

June 24—The *Volksammer* (parliament) appoints Honecker as chairman of the National Defense Council; the post was held by Ulbricht.

GERMANY, FEDERAL REPUBLIC OF (West)

(See also *Bulgaria; U.S., Foreign Policy*)

June 4—Two West Berlin travel agencies announce that they have been forced to cancel all flights to Varna, Bulgaria, as a result of the cancellation of landing rights by Bulgaria.

June 25—In a speech, Chancellor Willy Brandt says that it is time for the governments of East and West Germany to talk about "regulating" their relations.

ICELAND

June 14—Following yesterday's election Premier Johann Hafstein announces the resignation of the coalition government formed by the Independence and the Social Democratic parties.

June 19—President Kristjan Eldjarn asks Olafur Johanesson, a leader of the Progressive party, to form a new government.

INDIA

June 27—The 10-party coalition government of West Bengal announces that it will re

sign tomorrow; the move, attributed to the problems created by the influx of refugees from East Pakistan, will result in direct rule by the national government.

IRAQ

une 7—Baghdad radio reports that Iraq has reached agreement on pricing with foreign oil companies; the posted price is increased 80¢ a barrel to $3.21.

une 24—Baghdad radio reports that Iraq and the Soviet Union have signed a "protocol of cooperation."

ISRAEL

(See also *Intl, Middle East*)

une 4—The Israeli government announces that a 10-man Syrian espionage ring has been uncovered in the occupied Golan Heights; all of the members of the group have been captured.

une 30—The foreign ministry announces that the visiting director of the U.S. Central Intelligence Agency, Richard Helms, has conferred with Premier Golda Meir and other leading Israeli officials.

ITALY

une 15—Late results of balloting on June 13–14 in local elections in the province of Rome, and in Sicily, Genoa and southern Italy show important gains for the neo-Fascist Italian Social Movement, which captured 13.9 per cent of the total vote cast.

JAPAN

(See also *China; U.S., Foreign Policy*)

une 9—A spokesman for the Komeito, Japan's 2d largest opposition party, announces that the party has been invited to send a delegation to Communist China. The party chairman says that the party advocates the recognition of the Peking government as the only legitimate government of China.

une 15—The Cabinet approves the agreement with the U.S. returning Okinawa and the other Ryukyu Islands to Japan; rioting students claim that the agreement is meaningless unless U.S. bases are closed and U.S. forces are withdrawn.

June 29—Complete returns from the election held on June 27 for the House of Councilors show that the Liberal-Democrats won 63 of the 125 seats that were contested.

The U.S. and Japan sign an agreement requiring Japan to take over the major defense of Okinawa by July 1, 1973.

JORDAN

June 2—In a letter to Premier Wasfi Tal, King Hussein orders firm measures in dealing with Palestinian commandos whom the King accuses of wishing to "establish a separate Palestinian state and destroy the unity of the Jordanian and Palestinian people."

June 5—A government spokesman says that Palestinian guerrillas have attacked 3 Jordanian army positions in northern Jordan.

KOREA, PEOPLE'S DEMOCRATIC REPUBLIC OF (North)

June 12—At a meeting of the Korea Military Armistice Commission, the United Nations Command proposes that the demilitarized zone be cleared of all military installations and reclaimed for farming; North Korea rejects the proposal.

KOREA, REPUBLIC OF (South)

June 3—Premier Paik Too Chin and all 18 members of the Cabinet resign so that President Chung Hee Park can appoint a new Cabinet following the recent national elections. President Park appoints Kim Chong Pil as Premier and replaces 9 members of the Cabinet.

June 12—U.S. Ambassador at Large David Kennedy arrives to discuss textile trade affairs with South Korean officials.

June 20—Kennedy departs for Hong Kong at the conclusion of the unsuccessful textile trade talks; no agreement was reached in the talks.

June 26—The government announces that, effective June 28, the won will be devalued by about 13 per cent.

LAOS

(See *Intl, War in Indochina*)

MALTA

June 16—It is reported that the opposition Labor party has won a one-seat majority in the House of Representatives in today's elections; the Labor party will have 28 seats and the Nationalist party (in power for the last 9 years), 27 seats.

June 28—A U.S. destroyer and a replacement unit of the British commandos arrive without incident; the arrangements for the visits were made before Prime Minister Dom Mintoff made it known that he does not want the Sixth Fleet or British commandos to visit Malta until NATO defense agreements are revised.

MEXICO

June 10—6 youths are killed in street fighting in Mexico City between anti-government students and right-wing extremists. Riot police are reported to have watched as the armed extremists attacked the students.

June 11—The government denies any connection with last night's rioting.

June 18—Special investigators begin examining documents in city hall in Mexico City, searching for evidence to support charges that city officials maintain a secret army of rightist youths; the mayor of the city resigned last night.

PAKISTAN

(See also *U.S., Foreign Policy*)

June 4—*Jang,* the largest newspaper in Pakistan, reports that moves are under way to form a new party that would include leading members of the outlawed Awami League, which has campaigned for autonomy for East Pakistan.

June 10—The Pakistani government appeals to refugees from East Pakistan to return home; a general amnesty is offered.

POLAND

(See also *U.S.S.R.*)

June 13—According to *The New York Times,* more than 100 Polish industrial managers, Communist party leaders and government officials (including Edward Gierek, the First Secretary of the party, and Premier Piotr Jaroszewicz) attend a trade fair today and hold an industrial summit meeting.

June 23—The government gives the Roman Catholic Church title to former church buildings in the territory acquired from Germany after World War II.

June 24—Premier Piotr Jaroszewicz presents the new 5-year plan, which places more emphasis on consumer needs, to the Central Committee of the Communist party.

June 26—Cuban Foreign Minister Raul Roa concludes 4 days of talks with Polish leaders.

RUMANIA

(See *China*)

SOUTH AFRICA

(See also *Intl, Intl Court of Justice, O.A.U.*)

June 7—In a newspaper interview, Michael Botha, Minister of Bantu Administration, announces that the government will ease penalties imposed on Africans breaking regulations designed to limit their movements within South Africa.

June 8—Government officials indicate that South Africa intends to continue to administer the territory of South-West Africa.

TURKEY

June 1—Policemen kill one guerrilla and wound another in freeing a Turkish army major's daughter who was held hostage by 2 members of the Turkish People's Liberation Army.

U.S.S.R.

(See also *United Kingdom; U.S., Science and Space*)

June 2—*Pravda,* the Communist party newspaper, and *Izvestia,* the government newspaper, publish statements that are highly critical of U.S. efforts in the Middle East; they charge that the U.S. is trying to drive a wedge between the U.A.R. and the U.S.S.R.

June 7—Soyuz 11, the spacecraft which was launched yesterday with 3 astronauts aboard, docks with the orbiting space station Salyut; the 3 astronauts board the space station.

June 8—The draft of a treaty proposed by the U.S.S.R. is made public; the treaty, presented to the U.N. on June 4 for consideration by the General Assembly in the fall of 1971, calls for international cooperation on the moon and a prohibition against any nation's setting up military bases there.

A Polish delegation headed by Premier Piotr Jaroszewicz begins talks with Premier Aleksei Kosygin and other Soviet experts on major changes in Polish economic planning.

June 10—In a nationally televised speech, President Nikolai Podgorny is critical of the North Atlantic Treaty Organization's cautious approach to the reduction of troops in Central Europe as proposed by the U.S.S.R.

June 11—In a nationally televised address, Leonid Brezhnev, General Secretary of the Communist party, calls on the U.S. to accept the principle of arms parity with the U.S.S.R.

June 13—*Tass,* the Soviet press agency, reports that Defense Minister Andrei Grechko and Admiral Sergei Gorshkov, commander in chief of the Navy, have visited the Soviet naval squadron in the Mediterranean.

June 14—*Izvestia* reports that the ship carrying Grechko during his survey of the Soviet fleet in the Mediterranean was tracked and harassed by U.S. ships and planes in the area.

June 17—The signing of a preliminary agreement between the U.S.S.R. and Mack Trucks, Inc. (a U.S. company), is announced. The agreement, which requires U.S. government approval, calls for Mack to design and supply equipment for a major part of a planned truck plant that would be the largest in the world.

June 21—Cuban Foreign Minister Raul Roa concludes an 11-day official visit.

June 30—The 3 Soviet astronauts who returned to earth after nearly 24 days (the longest manned space flight in history), are found dead in their space capsule, Soyuz 11. An investigation is ordered.

U.A.R.

(See also *Intl, Middle East*)

June 19—King Faisal of Saudi Arabia arrives in Cairo for a 7-day visit.

June 26—King Faisal and President Anwar el-Sadat conclude a week of talks; they send a joint message to King Hussein of Jordan.

UNITED KINGDOM

(See also *Intl, European Economic Community*)

June 8—In a meeting with Foreign Secretary Sir Alec Douglas-Home, the visiting Soviet disarmament expert, Semyon Tsarapkin, discusses his government's foreign policy.

June 20—Government officials announce that Anatoly Fedoseyev, a Soviet space expert who disappeared from the Paris Air Show last month, is in Britain where he has been granted asylum.

June 22—The Foreign Office announces that 2 Soviet diplomats have been ordered to leave the country; the 2 have been "detected in intelligence operations against the United Kingdom." Yesterday the Soviet Foreign Ministry demanded the withdrawal of 2 British diplomats.

Northern Ireland

June 6—At least 8 persons were injured by bomb explosions in Belfast last night and today as Roman Catholic rioters battle British troops.

June 13—Militant Protestants, attempting to march into a predominantly Roman Catholic village in defiance of a government ban on demonstrations, battle troops and police.

UNITED STATES

Civil Rights and Race Relations

June 3—Secretary of Labor James Hodgson announces the immediate imposition of a mandatory racial hiring plan for construction workers in San Francisco on federally funded construction.

June 4—Arthur Fletcher, Assistant Secretary of Labor for Wages and Labor Standards, announces that the federal government will impose racial hiring quotas in the construction industry in Chicago following the failure of a voluntary equal hiring program.

June 11—President Richard Nixon issues a major policy statement in which he pledges vigorously to enforce existing regulations barring racial discrimination in housing; however, he refuses to use the power of the federal government to force local communities to accept housing for low and moderate income groups.

June 14—Attorney General John Mitchell announces that the government is filing suit against Blackjack, Missouri, charging the community with illegally blocking an integrated housing development. Secretary of Housing and Urban Development George Romney issues proposed guidelines that would limit federal grants for community development to communities agreeing to plan for low and moderate income housing. The statements are made at a joint news conference.

June 17—The Labor Department orders into effect minority-group hiring quotas for federally financed construction projects in Seattle.

The Department of Health, Education and Welfare releases a survey indicating that public school integration has increased in the South in the past 2 years, but that it has declined in most Northern cities.

June 18—The Pennsylvania Human Relations Commission orders the public school districts of Philadelphia and Pittsburgh to eliminate racial imbalance.

June 19—A U.S. Court of Appeals orders the Bethlehem Steel Company and the United Steelworkers of America, in a plant in New York State, to permit Negro employees to transfer from "hotter and dirtier" jobs to cleaner and higher paying jobs without loss of seniority or pay.

Economy

June 1—White House press secretary Ronald Ziegler indicates President Richard Nixon's displeasure at the wage and price increases announced yesterday in the aluminum industry.

June 25—George Romney, Secretary of Housing and Urban Development, proposes regulations for the construction industry that would link increased compensation for white-collar workers to wage increases for blue-collar workers. The regulations would require that any resulting savings in wage costs be used to keep prices down; they involve the first use by the administration of limited price controls for fighting inflation.

Foreign Policy

(See also *Intl, Berlin, NATO; Cuba; Japan; U.S.S.R.*)

June 2—The Israeli Ambassador to the U.S., Itzhak Rabin, confers with Joseph Sisco, the Assistant Secretary of State for Near Eastern and South Asian Affairs; according to *The New York Times,* Rabin asks for a long-term U.S. commitment on arms deliveries to Israel.

June 3—According to *The New York Times,* the U.S. will license for delivery to the U.S.S.R. more than $50 million of equipment, chiefly for the manufacture of light trucks.

June 7—The State Department issues a statement saying that the material and financial support that the U.S. is supplying to Thai "volunteers" fighting in Laos is

"fully consistent with all pertinent legislation."

June 8—Clark Clifford, a former Secretary of Defense, outlines a proposal calling for the withdrawal of U.S. forces from Indochina by December 31, 1971, and the release of all U.S. prisoners of war within 30 days of the announcement of an accord.

June 9—Deputy federal marshals seize a Soviet freighter in Alameda, California, as security for a $377,000 damage suit filed by a Massachusetts company which claims that Soviet trawlers damaged its lobster fishing equipment.

June 10—President Nixon announces the end of the 21-year-old trade embargo with Communist China; 47 categories of nonstrategic exportable items are listed. Controls are lifted on all imports from China. He also announces the decision to suspend certain shipping requirements which have inhibited the export of grains to the U.S.S.R., East Europe, and China.

Following a ministerial meeting at the State Department, Russell Train, chairman of the Environmental Protection Agency, announces a U.S.-Canadian agreement on a $2–$3-billion program to end pollution of the Great Lakes by 1975.

June 15—West German Chancellor Willy Brandt, in the U.S. on a 5-day private visit, confers with President Richard Nixon on the status of negotiations on West Berlin and the possibility of troop reductions.

The Soviet freighter seized on June 9 is freed by court order.

June 16—In Washington, D.C., Secretary of State Rogers confers with Soviet Ambassador Anatoly Dobrynin on the possibility of negotiations on mutual and balanced troop reductions by NATO and Warsaw Pact countries.

In Philadelphia, the U.S. Conference of Mayors votes, 54–49, in favor of withdrawing all U.S. troops from Vietnam by December 31.

June 17—Japanese Foreign Minister Kiichi Aichi in Tokyo and Rogers in Washington simultaneously sign a treaty calling for the return of Okinawa and the other islands of the Ryukyu chain to Japan at an unspecified date in 1972; the treaty, which must be ratified by the Japanese Diet and the U.S. Senate, prohibits the U.S. from storing nuclear weapons on the island without Japanese consent. The U.S. will retain some military bases on Okinawa.

June 21—In response to inquiries, State Department officials acknowledge that some "foreign military sales" items are being shipped to Pakistan from the U.S.

June 22—In a 57-to-42 vote, the Senate adopts an amendment to the Selective Service Bill, calling for the withdrawal of all U.S. forces from Indochina within 9 months if U.S. prisoners of war are released.

June 27—Vice President Spiro Agnew begins a goodwill mission to 10 nations in Asia, Africa and Europe.

June 28—In a 219-to-176 vote, the House rejects the amendment passed by the Senate on June 22 which calls for the withdrawal of U.S. troops from Vietnam in 9 months.

June 30—President Nixon announces that Turkish Premier Nihat Erim has agreed to ban the cultivation of the opium poppy in Turkey by June, 1972.

Government

(See also *U.S., Press*)

June 1—In a nationally televised news conference, President Richard Nixon pledges an all-out offensive on the problem of drug abuse by servicemen and civilians; he warns that increased Soviet arms shipments to the Middle East could provoke a new arms race; he praises the behavior of the police of Washington, D.C., during the May Day antiwar demonstrations.

June 3—Completing congressional action on the measure, the Senate votes its approval of the proposed merger of volunteer service programs, such as the Peace Corps and VISTA, into one agency to be known as ACTION; the reorganization will go into effect on July 1.

June 4—In a message to Congress, President Nixon proposes a program that would assure the country of "an adequate supply of clean energy in the years ahead."

June 5—President Nixon dedicates the $1.2-billion Arkansas River Navigation System.

June 7—The Atomic Energy Commission proposes new regulations lowering the permissible radiation exposure levels for the public from nuclear power plants.

June 8—Information provided by J. Edgar Hoover, the chief of the Federal Bureau of Investigation, to a House Appropriations subcommittee on March 17, is made public. Hoover denied that the F.B.I. ever tapped the telephones of any member of Congress.

June 10—Attorney General John Mitchell withdraws his objections to the creation of multimember legislative districts in Virginia; Mitchell's withdrawal of his objections is based on the Supreme Court ruling which approved multimember districts in Indianapolis. (See also *U.S., Supreme Court.*)

June 15—President Nixon nominates Robert F. Froehlke as Secretary of the Army; Froehlke is now Assistant Secretary of Defense for Administration.

A federal district court judge in Washington orders the F.B.I. to stop distributing arrest records from its files to banks, employers and others who are not law enforcement agencies.

June 17—President Nixon names Dr. Jerome Jaffe to head a new Special Action Office of Drug Abuse Prevention and asks Congress for an additional $155 million for a campaign for drug abuse control.

June 22—Addressing the annual convention of the American Medical Association in Atlantic City, President Nixon says that a proposed national health insurance plan would cost too much and would burden doctors with too much bureaucracy.

June 29—President Nixon vetoes the $5.6-billion economic development bill that includes a $2-billion provision for public works projects in areas of high unemployment. He names Secretary of the Treasury John Connally, Jr., as his "chief economic spokesman." Connally announces that the President intends to pursue his present economic policies; a tax cut or increased spending to stimulate the economy and federal attempts to control prices and wages are ruled out.

June 30—Ohio ratifies the 26th Amendment to the Constitution, lowering the minimum voting age to 18 years for state, local and federal elections. With Ohio's action, the amendment becomes effective.

Both houses of Congress pass a compromise bill appropriating $5.14 billion for aid to education. A compromise bill appropriating $4.52 billion for the Treasury Department, the Postal Service, and the executive office of the President is also passed.

Labor

(See also *Government*)

June 1—Western Union employees (17,000 of them members of the United Telegraph Workers and another 3,100 members of the Communication Workers of America) go on strike.

June 3—In a letter to the general executive board of the International Brotherhood of Teamsters, James Hoffa announces that he will not stand for reelection as president of the union. Hoffa has been imprisoned for several years.

June 15—Responding to a federal court order, W. A. Boyle, president of the United Mine Workers of America, resigns as a member of the board of trustees of the U.M.W. Welfare and Retirement Fund, Inc. Union miners widen their wildcat strike which began on June 14.

June 16—Labor Department figures reveal that wage settlements in the construction industry approved by the Construction Industry Stabilization Committee have averaged 6.1 per cent; last year the increase averaged about 18 per cent.

June 17—Responding to an appeal from U.M.W. President Boyle, striking miners begin to return to work.

June 19—Secretary of Labor James D. Hodgson announces a $20-million national manpower program to aid migrant farm workers which will be run by the Farm Labor Service.

June 21—After Frank Fitzsimmons is sworn in as the new president of the International Brotherhood of Teamsters, President Nixon addresses the board of the union in private session and declares that he looks forward to open dialogue with all unions.

Military

June 2—The Army accuses Brigadier General John Donaldson of murdering 6 Vietnamese civilians in the winter of 1968–69; Lieutenant Colonel William McCloskey is accused of 2 separate killings.

Politics

June 12—Charles Evers, the Negro Mayor of Fayette, Mississippi, opens his campaign for governor; he will run as an independent.

June 16—In Washington, D.C., a federal court judge rules invalid the Democratic National Committee's new formula for apportioning 1972 convention delegates among the states.

Press

June 13—*The New York Times* begins the publication of documents from a Pentagon study (commissioned in June, 1967, by the former Secretary of Defense, Robert McNamara) of the growing U.S. involvement in Indochina and of articles based on the study. The 47-volume study, which covers the period from the end of World War II to mid-1968, is classified as top secret by the government; it is entitled "History of U.S. Decision-Making Processes on Vietnam Policy."

June 15—At the request of the Justice Department, United States District Judge Murray Gurfein orders *The New York Times* to halt publication for 4 days of the secret Vietnam study. The federal government charges that publication would seriously injure U.S. relations with other nations.

June 18—*The Washington Post* begins publication of a series of articles based on the classified Vietnam study; the Justice Department appeals the decision by District Judge Gerhard Gesell that the government has no right to seek prior restraint of the articles.

Herbert Klein, Director of Communications for the Administration, says that President Nixon is more concerned about the precedent that might be established in publishing secret documents than he is that national security might be threatened by such publication.

June 19—Ruling 2 to 1, a federal appeals panel orders a halt in publication of the disputed material in *The Washington Post*.

White House press secretary Ronald Ziegler says that one reason for barring the publication of secret documents is that the government "cannot operate its foreign policy in the best interests of the American people if it cannot deal with foreign powers in a confidential way."

June 22—*The Chicago Sun-Times* and *The Boston Globe* begin publishing accounts based on the "Pentagon papers"; *The Globe* is restrained from further publication of the series by a federal district judge.

June 23—President Nixon announces that the complete text of the Pentagon study will be made available to Congress, but the documents will retain their secret classification.

June 24—Following a decision by a U.S. court of appeals limiting the *Times's* right to publish, *The New York Times* appeals to the U.S. Supreme Court to permit it to resume publication of material contained in the Pentagon review of the Vietnam situation. The Justice Department appeals to the Supreme Court an appellate court ruling that would permit the *Post* to resume publication of the "Pentagon papers."

June 28—Daniel Ellsberg, a former official in the Defense Department, announces that he gave the secret "Pentagon papers" to

the press; he surrenders to the U.S. Attorney in Boston.

June 29—In a 6-to-3 unsigned opinion, the Court issues its decision that the newspapers have the right to publish the secret Pentagon papers. The decision states that any attempt by the government to bar news stories prior to publication bears "a heavy burden of presumption against its constitutionality," a burden which the government "has not met."

Science and Space

June 25—In Houston, U.S. and Soviet space experts conclude 5 days of talks on the development of a compatible docking system; they declare a study is being made of plans for a U.S.-Soviet space link-up.

Supreme Court

(See also *U.S., Press*)

June 1—In a 5-to-4 ruling, the Court decides that cities cannot make it a crime for small groups of persons to loiter in public places.

The Court rules 5 to 4 that federal judges have broad authority to issue anti-strike injunctions against railroads and airline unions that fail to make reasonable efforts to negotiate disputes before going on strike.

June 3—In a 6-to-3 decision, the Court rules that Hinds County, Mississippi, must be divided into single-member legislative districts in order to give Negroes the opportunity to elect members of their own race to legislative bodies.

June 7—The Court rules 5 to 3 that states are not required to create separate legislative districts for urban Negroes merely because the election of legislators "at large" from an urban area provides Negroes with little representation; no explanation is given of how the ruling, which applies to Indianapolis, is different from the Hinds County ruling.

In a unanimous decision, the Court rules that persons can sue in federal court anyone who conspires to deprive them of their civil rights.

The Court rules that private individua involved in matters of public interest mus prove that they were victims of actua malice (as a result of circulated falsehoo or recklessness) before collecting libe awards.

June 14—In a 5-to-4 decision, the Court rule that communities may close publicly-owne recreational facilities rather than compl with court orders to desegregate them.

June 21—The Court, in a 6-to-3 decisio rules that juveniles do not have a constitu tional right to a trial by jury.

June 28—In an 8-to-1 ruling, the Court de clares that state programs which reimburs church-related schools for instruction i nonreligious subjects are unconstitutiona The ruling directly affects the nation' Catholic parochial school system.

In a 5-to-4 ruling, the Court upholds th constitutionality of the Federal Higher Edu cation Facilities Act of 1963, under whic federal funds are granted for the construc tion of academic buildings on the campuse of private colleges, including church-relate institutions.

In an 8-to-0 decision, the Court rule that Muhammad Ali, the former Cassiu Clay and ex-heavyweight boxing cham pion, was improperly drafted into th Army.

VIETNAM, DEMOCRATIC REPUBLIC OF (North)

June 12—The North Vietnamese press agenc reports that the new National Assembl recently reelected Ton Duc Thang as Pres dent.

VIETNAM, REPUBLIC OF (South)

June 12—An official government statemer announces the reshuffling of the Cabin yesterday by President Nguyen Van Thieu the number of Cabinet members is reduce from 30 to 26.

June 23—President Thieu signs into law bill limiting the number of presidential ca didates.

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